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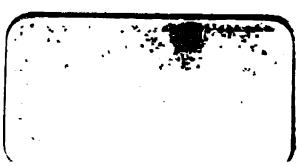

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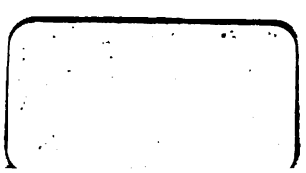

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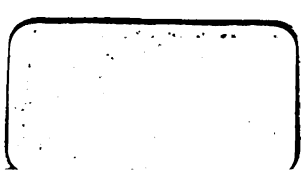

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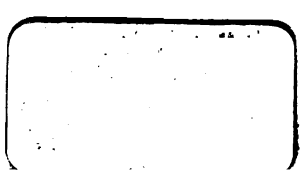

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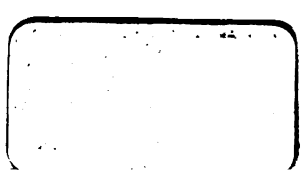

CASES

RELATING TO

RAILWAYS AND CANALS,

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity;

1849 TO 1852.

BY

LIONEL OLIVER, EDWARD BEAVAN, & THOMAS E. P. LEFROY,

ESQUIRES, BARRISTERS-AT-LAW.

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1852.

JUDGES OF THE SEVERAL COURTS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

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Lord Truro	
Sir James Lewis Knight Bruce	*Lords Justices.*
Lord Cranworth	
Lord Langdale	*Masters of the Rolls.*
Sir John Romilly	
Sir Lancelot Shadwell	*Vice-Chancellor of England.*
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Sir John Jervis.	Sir John Romilly.
Sir John Romilly.	Sir James A. E. Cockburn.
Sir James Alexander Edmund Cockburn.	Sir William Page Wood.

ERRATA.

Page 618, *in name of case, for* The London & North Western Railway Company *v.* M'Michael *read* The North Western Railway Company *v.* M'Michael.

634, *line* 4 *of case, for* Birstoll *read* Birstall.

687, *for* by the Lord Chancellor, *read* by the House of Lords.

735, 13 *lines from bottom, for* 79th *read* 69th.

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RAILWAY AND CANAL CASES.

COURT OF QUEEN'S BENCH.

Trinity Term, 1849.

Ex parte TOOKE, *In re* THE LONDONDERRY AND COLERAINE RAILWAY COMPANY.

1849.

July 5th.

The resolution of the Board of Directors of a Railway Company, that a call be made, is the call within the 8 Vict. c. 16, s. 16.

THIS was a rule calling upon the secretary of the Londonderry and Coleraine Railway Company to shew cause why a mandamus should not issue commanding him to enter a memorial of a deed of transfer, dated the 29th of January, 1849, of 200 half shares in the said Company, of 12*l.* 10*s.* each, numbered &c., by Edmund Hurrell to Thomas H. Tooke, and indorse such entry on the deed, in compliance with the Companies Clauses Consolidation Act, 1845.

It appeared, that on the 29th of January, 1849, Mr. Tooke purchased of Mr. Hurrell, the registered owner, the 200 half shares, and on the same day a deed of transfer was executed by him to Tooke. That, on the previous day a resolution was made by the directors of the Company, that a further call of 2*l.* 10*s.* upon each 12*l.* 10*s.* half share be made, payable by two instalments of 1*l.* 5*s.* each, on the 20th of July and the 20th of October then next. Notice of this call was, on the 29th of January, advertised in the public newspapers, appointing a time and place of payment. On the 30th of January Mr. Tooke

1849.
Ex parte TOOKE, *In re* THE LONDONDERRY AND COLERAINE RAILWAY CO.

applied to the secretary of the Company to enter a memorial of the deed of transfer on the register, but he declined to do this unless the first instalment of the calls was paid, which was refused. Before this time Mr. Tooke had no knowledge of the call having been made, nor had Mr. Hurrell, and, consequently, that call had not been paid. On the 4th of February, Mr. Tooke received a written notice of the call, dated the 29th January, 1849.

The *Attorney-General* (Sir *John Jervis*), and *J. Brown*, now shewed cause(*a*).—The Company is not bound to register the transfer, unless at the time of the transfer all the calls had been paid: 8 Vict. c. 16, s. 16; it is, therefore, necessary to consider whether the resolution of the directors, of the 28th of January, was the call, or merely an intimation of an intention to make a call; and it is submitted that the resolution itself was, in fact, the call. The 22nd section directs, that twenty-one days' notice be given of each call; the notice, therefore, cannot be the call, the call, and the notice of the call, being two distinct things. [They cited *The Newry and Enniskillen Railway Company* v. *Edmunds* (*b*), *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock* (*c*), *Shaw* v. *Rowley* (*d*), *The Aylesbury Railway Company* v. *Mount* (*e*)].

Crowder and *Phipson*, in support of the rule.—The resolution is a mere intimation of an intention to make a call, and the call does not become effective until the shareholder has notice of it. This has been so decided in *The Newry and Enniskillen Railway Company* v. *Edmunds*, and *Shaw* v. *Rowley*, and this view renders the 16th, 21st, and

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., and *Erle*, J.

(*b*) Ante, Vol. 5, p. 275; *S. C.*, 2 Exch. 118.

(*c*) Ante, Vol. 2, p. 522; *S. C.*, 7 M & W. 574.

(*d*) Ante, Vol. 5, p. 47; *S. C.*, 16 M. & W. 810.

(*e*) Ante, Vol. 2, p. 679; 4 M. & G. 651.

22nd sections consistent with each other. [*Erle*, J.—The statute treats the call as the act of the whole Company, so that every shareholder is presumed to have notice of it. If the notice of the call is the call itself, that is hardly intelligible: it is a self-contradiction.] But the Act treats the call as something final, which a resolution is not: that may be rescinded at any time.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court. —The facts raising the question, when a call is made within the meaning of the 8 Vict. c. 16, s. 14, were, that the directors passed the resolution by which the money was called for, then the transfer was executed, and offered to be delivered to the secretary, before either party had notice of the resolution, and the secretary refused to receive the transfer unless the assignor would pay the money so called for, alleging that a call had been made, which allegation the assignor denied. On considering the statute, and the cases bearing on the subject, it appears that a call may mean, either the resolution formally come to by those who have the power to determine that those who are bound to contribute, i. e. the shareholders, shall pay a certain instalment; or it may be that resolution, together with notice to the persons called on, of such resolution having been come to; or the combination of facts making the parties called on liable to an action for nonpayment of the money called for: the last meaning not being applicable, the question lies between the other constructions; and we have come to the conclusion that the first is correct, and that a call is made within the meaning of this section, when the resolution above described has been come to. The section which restrains the power of transfer, (the 16th,) using the words "after any call shall be made," must be construed with reference to the 22nd section, which empowers the Company to make calls; and looking at that, it seems clear

1849.

Ex parte TOOKE, *In re* THE LONDONDERRY AND COLERAINE RAILWAY CO.

that the making of the call, and the notice of it, which must mean of its having been made, are two distinct things, and that the call must be made before the notice of its having been made can be given. Now, between the resolution and the notice no act intervenes, nor need anything precede the making of the resolution; if so, it follows necessarily that the resolution is the making of the call. The language of the 27th section leads to the same conclusion. Under that, the Company, in an action for calls, must prove three things, and they need prove no more; first, that the defendant was a holder of shares at the time of making the call; second, that such call was made; third, that such notice thereof (i. e. of the making the call) was given as that or the special Act required. If the notice was part of the act of making the call, it was unnecessary to add this third requisition, for it was included in the second. If the Company could not enforce payment of a call from a party who was not a member at the time when the resolution making the call was passed, convenience is on the side of this construction, for unless it be true, the Company, by such a transfer as the present, must either lose the call in respect of the shares transferred, or must make a partial separate call in respect of those shares, for which we find no provision. This construction does not appear to us to contravene the decisions approaching the point pronounced in other cases, but to be in accordance with them.

It may be superfluous to add, that, although the Company, by this judgment, compels the assignor to pay the call to them, such right of the Company against the assignor does not affect the right of the assignor against the assignee under the contract of transfer.

1849.

COURT OF EXCHEQUER.

Michaelmas Term, 1849.

THE GREAT NORTHERN RAILWAY COMPANY *v.* KENNEDY (*a*). *Nov.* 16*th*.

DEBT for calls, according to the form prescribed by 8 Vict. c. 16, s. 25.

The power given to Companies by the 29th section of the 8 Vict. c. 16, to declare shares forfeited on non-payment of calls, is a cumulative remedy with that of the right of action; and therefore, it is no defence to an action by a Company for calls, that since the commencement of the suit the directors have declared the shares forfeited.

Plea, puis darrein continuance.—That the said Company ought not further to maintain their action, because he says, that after the failure by the said defendant to pay the said calls in the said declaration mentioned, and more than twenty-one days before the making of the declaration of forfeiture hereinafter mentioned, the directors of the said Company caused a certain notice in writing, bearing date the day and year last aforesaid, to be, and the same was then duly transmitted by the post, according to the form of the statute in such case made and provided, to the usual place of abode of the said defendant, he the said defendant then being the holder and proprietor of the said shares in the said declaration mentioned, and being the person appearing by the register of shareholders of the said Company to be such proprietor of the said shares; whereby the directors then gave notice to the defendant of the intention of them the said directors, after twenty-one days from the date of the said notice, to declare the said shares in respect of which the said calls in the said declaration mentioned were then so payable as aforesaid, forfeited, and to take the steps necessary for having the forfeiture thereof confirmed. And the defendant further says, that afterwards and more than twenty-one days after the giving of the said notice to and the receipt of the same by the said defendant as aforesaid, and after the

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

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expiration of two months and upwards from each and every of the said days on or before which the said several calls in the said declaration mentioned were so respectively appointed to be paid as therein mentioned, to wit &c., the said directors did, in pursuance of the said notice and according to the form of the statute in such case made and provided, proceed to declare, and did then duly declare the said shares forfeited. And the defendant further says, that afterwards and more than fourteen days before the holding of the general meeting of the said Company hereinafter mentioned, to wit &c., public notice was given by the said directors of the said Company of the said meeting, according to the form of the statute in such case made and provided, to wit, by advertisement then duly published in that behalf, specifying the place, the day, the hour of the said meeting, and the purposes for which the same was called; that afterwards, and more than fourteen days after the said last-mentioned notice, and after the expiration of two months and upwards from the said day on which the said notice of the said intention to make such declaration of forfeiture had been and was so given as aforesaid, and after the last pleading in this suit, and within eight days now last past, to wit &c., an extraordinary general meeting of the shareholders of the said Company was, in pursuance of the said last-mentioned notice, duly held, according to the form of the statute, for the purpose, amongst other things, of confirming the forfeiture declared by the said directors of certain shares in the said Company, upon which calls were then in arrear, and amongst others of the said shares of the defendant in the said declaration mentioned. And the defendant further saith, that at the said meeting, and after the last pleading in this suit, and within eight days last past, to wit &c., the said calls in the said declaration mentioned then being and remaining wholly due and payable, and in arrear and unpaid, and the said meeting being then and there duly constituted in that behalf, and a quorum of

shareholders in the said Company, according to the form of the statute in such case made and provided, being then and there present, the said forfeiture of the said shares of the said defendant in the said declaration mentioned was duly confirmed by the said Company, according to the form of the statute in such case made and provided; and the said shares of the said defendant thereupon then became and were forfeited; and thereupon also at the said meeting the said Company, according to the form of the said statute, then made a certain order directing the said shares so forfeited as aforesaid to be disposed of for the purpose of raising the capital represented by such shares, to wit, by issuing in lieu of each of the said shares two scrip shares of 12*l.* 10*s.* each, of all which premises the said defendant then had due notice, and then assented to and acquiesced in the said forfeiture and disposal of his said shares.—Verification.

Demurrer and joinder.

Phipson, in support of the demurrer.—The plea is bad, for the power of declaring the shares forfeited is cumulative, and the forfeiture does not discharge the debt due in respect of the calls then made on the shares. This appears clear on reference to sections 25, 29, 31, 34, and 35 (*a*), of the Lands Clauses Consolidation Act, 8 Vict.

(*a*) Which enacts, sect. 25: "If, at the time appointed by the Company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the Company to sue such shareholder for the amount thereof, in any Court of law or equity having competent jurisdiction, and to recover the same, with lawful interest, from the day on which such call was payable."

Sect. 29 enacts: "If any shareholder fail to pay any call payable by him, together with the interest, if any, that shall have accrued thereon, the directors, at any time after the expiration of two months from the day appointed for payment of such call, may declare the share in respect of which such call was payable forfeited, and that whether the Company have sued for the amount of such call or not."

Sect. 31 enacts: "The said declaration of forfeiture shall not take effect so as to authorise the

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c. 16. This statute must be regarded as a legislative sanction to a parol agreement, and a forfeiture of shares operates as the forfeiture of a lease, in which case the re-entry for the forfeiture does not affect the right of action for rent in arrear: *Pennant's case* (*a*). [*Parke*, B.—Suppose the forfeited shares had been sold, and the proceeds applied in satisfaction of the calls; would not that have put an end to the action?] It is submitted that it would not, as the proceeds could not have been applied in payment of the costs of the action. [He cited *The Edinburgh, &c. Railway Company* v. *Hibblewhite* (*b*), *Giles* v. *Hutt* (*c*), *The London and Brighton Railway Company* v. *Fairclough* (*d*), *The Belfast and Down Railway Company* v. *Strange* (*e*).]

sale or other disposition of any share until such declaration have been confirmed at some general meeting of the Company to be held after the expiration of two months at the least from the day on which such notice of intention to make such declaration of forfeiture shall have been given; and it shall be lawful for the Company to confirm such forfeiture at any such meeting, and by an order at such meeting, or at any subsequent general meeting, to direct the share so forfeited to be sold or otherwise disposed of."

Sect. 34 enacts: "The Company shall not sell or transfer more of the shares of any such defaulter than will be sufficient, as nearly as can be ascertained at the time of such sale, to pay the arrears then due from such defaulter on account of any calls, together with interest, and the expenses attending such sale and declaration of forfeiture; and if the money produced by the sale of any such forfeited shares be more than sufficient to pay all arrears of calls and interest thereon due at the time of such sale, and the expenses attending the declaration of forfeiture and sale thereof, the surplus shall, on demand, be paid to the defaulter."

Sect. 35 enacts: "If payment of such arrears of calls and interest and expenses be made before any share so forfeited and vested in the Company shall have been sold, such share shall revert to the party to whom the same belonged before such forfeiture, in such manner as if such calls had been duly paid."

(*a*) 3 Rep. 64.

(*b*) Ante, Vol. 2, p. 237; *S. C.*, 6 M. & W. 707.

(*c*) Ante, Vol. 5, p. 505; *S. C.*, 3 Exch. 18.

(*d*) Ante, Vol. 2, p. 544; *S. C.*, 2 M. & G. 674.

(*e*) Ante, Vol. 5, p. 548; *S. C.*, 1 Exch. 739.

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Maynard, in support of the plea.—The cases of *Giles* v. *Hutt*, and *The Edinburgh Railway Company* v. *Hibblewhite*, are authorities to shew that the remedy of forfeiture is alternative, and the Company is bound to elect their remedy. It is true that the 29th section gives the power of forfeiture, whether the Company have sued or not; but the 25th section does not empower the Company to sue where there has been a forfeiture. [*Parke*, B.—If the declaration of forfeiture deprives the Company of their right of action, how are they to get their costs in the event of an action being pending?] The act of forfeiture in that case would be an abandonment of the costs.

Phipson replied.

POLLOCK, C. B.—I think, upon the true construction of this Act of Parliament, that the Company have not by the forfeiture barred themselves of their right of action. That remedy appears to me not to be alternative.

PARKE, B.—I quite concur. This case differs from *Giles* v. *Hutt;* for on looking at the deed of settlement there, it gave the Company in express terms the alternative remedy either of suing or of declaring the shares forfeited; and the Court held, that, having obtained judgment against the defendant for the calls, they had elected their remedy and could not afterwards declare a forfeiture. Whether their bringing an action only would have been an election was not decided, although I think that it would. But, looking at the 8 & 9 Vict. c. 16, it appears clear that the power to declare a forfeiture is not given as an alternative remedy, but as a further security for the calls until payment. The shares forfeited are in the nature of a pledge or mortgage, and until the claim is satisfied the action may be maintained. There would still be the right to the costs if payment was after action brought. I therefore think that the forfeiture is no bar to the action.

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ALDERSON, B.—By sect. 29, the shares may be forfeited whether an action has been brought or not, and this seems a legislative declaration that the Company may do both; and if so, the one remedy is cumulative upon the other.

ROLFE, B.—I agree with the rest of the Court. The holder is liable for all calls accruing before the shares become the property of another person. The power of declaring the shares forfeited was given to secure the payment of the calls.

Judgment for the plaintiff.

COURT OF EXCHEQUER.

Hilary Term, 1849.

Jan. 30th.

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The 68th section of the 7 & 8 Vict. c. 110, does not apply to proceedings by shareholders merely, but to all cases where a creditor may sue a Company. The Court will not, however, give leave to issue execution under that section, unless the creditor has used due diligence to obtain satisfaction out of the property and effects of the Company. Therefore, where the affairs of an insolvent Joint-stock Company, completely registered under the 7 & 8 Vict. c. 110, were directed to be wound up by the Court of Chancery under the 11 & 12 Vict. c. 45:—*Held*, that a judgment creditor was in the first instance bound to prove his debt before the Master under the 73rd section of that statute; but that, if that remedy proved abortive, this Court would, in the exercise of its discretion, permit the creditor to proceed directly against the persons liable to contribute under the 7 & 8 Vict. c. 110.

Semble, per *Platt*, B., that a proceeding under 7 & 8 Vict. c. 110, to obtain execution against a shareholder of a Company, is a proceeding in an action within the 73rd section of the 11 & 12 Vict. c. 45.

THIS was a rule which had been obtained by *Lush*, calling upon C. Lund, a former shareholder in the Company, to shew cause why the plaintiff should not be at liberty to issue execution against him upon a judgment obtained against the above-named Company.

From the affidavits it appeared that the Company was completely registered under 7 & 8 Vict. c. 110, and that

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the plaintiff, on the 16th of May, 1848, had recovered a judgment against the Company, on which he had, on the 25th of that month, issued a fieri facias, and to which the sheriff had returned nulla bona. It was also sworn that 163*l.* 3*s.* 6*d.* was due to the plaintiff, and that any further execution against the property of the Company would be unavailing, and that the plaintiff's only prospect of obtaining satisfaction of his debt, was by proceeding against the individual members of the Company. On the 10th of November an order was made in the Court of Chancery, under the 11 & 12 Vict. c. 45 (the Joint-stock Companies Winding-up Act), for the dissolution and winding up of the Company, and a reference was made to the Master of its affairs to be wound up, and an official manager was appointed.

Phipson now shewed cause.—*First*, the 68th section of the 7 & 8 Vict. c. 110, does not apply to the present case, but is confined to the case of a shareholder endeavouring to reimburse himself by reason of his having been compelled to satisfy a judgment of the Company. [*Parke*, B. —Is that so? The Court of Common Pleas thought differently in *Peart* v. *The Universal Salvage Company* (*a*). *Alderson*, B.—To make the statute intelligible we must read the words "suit" and "recover," in the 67th and 68th sections, in a somewhat qualified sense. The course contemplated by the three sections is this:—A creditor recovers against the Company and obtains execution against their property unsuccessfully; and he then applies to the Court, under the 68th section, to have execution against the property of the shareholders. He gets execution and his debt from the property of a shareholder, who then becomes entitled, under the 67th section, to recover from the Company, and under the 68th section may apply to

(*a*) Ante, Vol. 5, p. 347; *S. C.*, 6 C. B. 478.

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the Court, on the ground that he has been obliged to pay the debt of the Company, and have execution against the property of the Company. If he cannot get his money in that way, he must go to a Court of equity to recover contribution from his co-shareholders. If we read the words "at the suit of," in the 68th section, as meaning "on the application of," and "to recover," in the 67th section, as "entitled to have," it makes all clear.] *Secondly*, the plaintiff ought to have gone before the Master under the 11 & 12 Vict. c. 45, s. 73; and if creditors are enabled to proceed against shareholders under the 7 & 8 Vict. c. 110, whilst proceedings are pending before the Master, the object of the first-mentioned Act will be defeated.

Lush, contrà.—The dissolution of the Company, and the reference to the Master, under the 11 & 12 Vict. c. 45, does not deprive the plaintiff of his remedy under the 7 & 8 Vict. c. 110. The object of the reference to the Master is to ascertain the amount of liability; and where the amount is ascertained, as in this case, or where the Master has not the means of ascertaining it, as in actions of trespass, then the Act does not apply. [*Alderson*, B.—Where the Company's affairs are not before the Master, a creditor has a right to have his debt satisfied from shareholders for the time being, or from former shareholders; but if, on a reference before the Master, the plaintiff is entitled to be paid out of the Company's assets, or from the contribution of the shareholders, the Master would exhaust one source before having recourse to the other, and so he would be enabled to do complete equity between the shareholders, making those pay who ought to pay, and also between the creditors themselves, which we cannot do; and if it is in our discretion whether we will act or not, and there is another tribunal that can do complete equity, ought we not to refer you there?] It is submitted that the Court is

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bound to do justice; and if the plaintiff has a legal right the Court ought to assist him in enforcing it. [*Alderson*, B.—You have the power of going before a tribunal who can pay you out of the assets of the Company, and you cannot have execution against a shareholder until you have used due diligence against the common fund. Have you used due diligence until you have resorted to that tribunal?] It is submitted that we have, seeing that the Company is insolvent, and has no funds; and the Court will not saddle the plaintiff with a useless expenditure in going before the Master. The permission of the Master, required by the 58th section, before bringing an action against a shareholder, refers to actions in their popular sense, and not to the case of a judgment recovered. [*Parke*, B.—You may come here again, after you have exhausted your remedy before the Master; and, as to there being no assets, the Master has the power of creating them by making calls on the shareholders.]

PARKE, B.—This rule must be discharged. The first point is, whether, since the 7 & 8 Vict. c. 110, execution ought to issue under circumstances like the present; which raises the question, whether the Court of Common Pleas was right in *Peart* v. *The Universal Salvage Company*. The question there was, whether, under the 68th section, the proceeding by scire facias or suggestion, on a judgment obtained against such a Company as this, was abolished only in cases of execution sued against the Company by shareholders; and the Court there decided, according to what I consider to be the true construction of that section, that the remedy was not confined to such a case. The 68th section provides [His Lordship read the section.] No doubt the words "at the suit of any shareholder or former shareholder," must refer either to all the antecedents, or to the last. The Court of Common Pleas properly said, that if those words referred to all

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the antecedents, the sentence would be absurd; because no power is given to shareholders to bring actions against the Company; that such a power could not be created by this section, and consequently, that those words must be confined to the last antecedent. By so confining them we get rid of an apparent absurdity; for otherwise, every individual shareholder who recovered against a joint-stock Company must apply to the Court for leave to issue execution. I think, according to the construction of the 67th section, taken in connection with the 68th, the meaning of the legislature was, not that an individual shareholder who had been compelled to pay the debts of the Company, should have an action against the Company, but that their intention was, as it seems to me, that if one individual be called on to pay the debts of the Company, he shall be at liberty to apply to the Court for leave to issue execution, without a suggestion or scire facias. That construction will reconcile the 66th, 67th, and 68th sections, and is the true construction of the Act. The result, therefore, will be, that the 68th section does not apply to proceedings by shareholders merely, but to all cases of creditors suing the Company; and whereas, by 7 & 8 Geo. 4, c. 46, they were compelled to have a scire facias, which is an inconvenient proceeding, this Act of Parliament gives a discretion to the Court or judge to determine all questions which formerly would have been determined on a scire facias; and the first question to inquire is, whether the person against whom execution is asked, be a shareholder or not, and this we may decide on affidavit, or by directing an issue, according to our discretion; and that discretion must be regulated with the view, not whether equitably the party ought to be called on to pay, but whether he is a shareholder liable to contribution. With respect to execution against shareholders, there is a duty imposed on the creditor by the 66th section; he may have immediate execution against the property and effects of the Company,

without leave of the Court; but when he comes for leave to sue other persons, it will only be granted if he has first used due diligence to obtain satisfaction out of the property and effects of the Company, and then the Court will give him permission to sue out execution against the property of the individual shareholders; so that the Court has alone to consider whether due diligence has been used to obtain satisfaction from the primary fund. This statute considers, that the first fund which ought to pay is that of the Company, and that the Courts will take care that individuals are not compelled to pay the debts of the Company until due diligence to obtain them from that fund shall have been used. But the 11 & 12 Vict. c. 45, puts the affairs of an insolvent Company in a different position, and directs them to be administered under a Master in Chancery, who is to collect the effects of the Company, and is empowered to apply to each individual shareholder liable to contribute, and thus to provide a fund for the payment of the partnership debts; therefore, we must see what is the construction of the 73rd section of that Act; and the effect of it appears to me to be, that all persons having debts against an insolvent Company, instead of suing the Company, must, in the first instance, prove their debts under that statute, and having proved, they are entitled to be paid. That mode of obtaining satisfaction is substituted by that statute for the direct remedy given by the former one; but if that should prove abortive, this Court will, in the exercise of its discretion, give leave to the creditor to proceed directly against the persons liable to contribute towards the debts of the Company; but, according to the true construction of the 7 & 8 Vict. c. 110, and the 11 & 12 Vict. c. 45, so long as there is a reasonable prospect of obtaining payment by means of the last-mentioned statute, it is our duty to prevent individual creditors being called on to make good the debts of the Company. We ought, therefore, to stay proceedings where any execution

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has actually issued; and consequently, we should now prevent this execution from issuing.

ALDERSON, B.—I am of the same opinion. On the first question I have expressed my opinion in the course of the argument. As to the last, it is clear that the party is not entitled to proceed against the shareholders of this Company, because he has not, under the circumstances of the case, used due diligence to obtain his debt from the assets of the Company. It is clear to me, that, if he is in a position to prove his debt before the Court of Chancery, we have power to stay the proceedings here, until he does so. When he is there he may get payment from the assets of the Company in the hands of the official manager; so that he has a right to go against a fund made up in part by the funds of the very person whom he wants to proceed against in this Court; for the property of this member and all the members of the Company will be responsible for his debt. It seems to me not only unjust to proceed in the first instance against individual members when he has a right to proceed against the common fund, but contrary to the construction of the statute. He cannot be considered to have used due diligence until he has adopted that course; when he has exhausted that remedy he may come here.

PLATT, B.—I am of the same opinion. This party is clearly a contributory to the Company within the 11 & 12 Vict. c. 45; for, by the interpretation clause of that Act, under that term is included every member of the Company, or other persons liable to contribute to its debts; and the party here appears to me clearly to fall within this description. Then the 73rd section says, that no creditor or other person shall, without the permission of the Master in Chancery, bring any action against the Company, or any person sued as contributory thereof, until after proof of the debt before the Master; and it seems to me that

this is in the nature of an action, after all, for by the 7 & 8 Vict. c. 110, it is put in the place of a scire facias, which is an action; and it does not follow that, because the form of proceeding is changed, that the nature of the thing is so also; I therefore think that this is an action within the meaning of the statute. I also think that any proceeding on a judgment is within the meaning of this statute; and, as there has been no permission of the Master to take it, the rule must be discharged.

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POLLOCK, C. B., concurred.

Rule discharged, without costs(*a*).

(*a*) See *Macgregor* v. *Keily*, post.

COURT OF EXCHEQUER.

Easter Term, 1848.

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May 3rd.

In the Matter of an Arbitration *Between* THE NORTH STAFFORDSHIRE RAILWAY COMPANY, *and* THOMAS LANDOR, RICHARD HUGHES, and ROBERT HUGHES.

A Railway Company requiring certain lands for their line, in pursuance of the 18th section of the Lands Clauses Consolidation Act, gave notice to L. & H., parties interested, to treat for their purchase. L. & H. thereupon served the Company with a notice, that, as trustees of F., they had *an estate and interest* in the lands, and claimed 3344*l.* for the same, and desired to have their compensation settled by arbitration; and they thereby appointed T. as their arbitrator. The Company nominated their arbitrator, and the arbitrators appointed an umpire, who proceeded with the reference. At the reference, one W. appeared, and claimed compensation, alleging that he had an agreement for the renewal of an unexpired lease in the premises. The umpire awarded 1861*l.* to be paid by the Company to L. & H. for the purchase "of the fee simple in possession, free from all incumbrances:"—*Held*, First, that the submission was not in compliance with the statute, the claimants not having therein stated the nature of their interest. Secondly, that the award was bad, the umpire not having found the nature and value of the interest of L. & H.; but the Court declined to interfere on motion.

Quære, whether the submission was binding on the parties by reason of their conduct.

IN this case a rule had been obtained calling on Thomas Landor, Richard Hughes, and Robert Hughes, to shew

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cause why an award made herein should not be set aside. From the affidavits it appeared that the North Staffordshire Railway Company, on the 30th December, 1846, gave notice to Messrs. Landor & Hughes, under the 18th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, that they required to purchase certain lands and hereditaments in which the said Messrs. Landor & Hughes were interested, and they desired the particulars of their estate and interest therein. On the 15th May, 1847, Messrs. Landor & Hughes sent to the Company the following notice:—

"To the North Staffordshire Railway Company, &c. We the undersigned, Thomas Landor, Richard Hughes, and Robert Hughes, do hereby give you notice, that, as trustees named and appointed in and by the last will and testament of F. F., we have and claim an estate and interest in certain copyhold lands and hereditaments, situate in Sutton, in the parish of Prestburg, in the county of Chester, required to be purchased or taken by the said Company, for the purposes of their said railway, and that we do claim compensation for the said lands and hereditaments, and that the sum of 3344*l.* 17*s.* 6*d.* is the amount of compensation we so claim. And we do hereby give you notice, and require you to purchase a certain plot of land, part of the said lands and hereditaments, situate in Sutton aforesaid, which will be cut off and divided by the works of the said railway, and adjoining or near to the plot of land numbered 422 in the plan and book of reference of the said Company. And we do hereby signify our desire to have the same compensation settled by arbitration. And we do hereby nominate and appoint Thomas Hill, of &c., to be one of the arbitrators in the premises; and we do hereby request you to nominate and appoint another arbitrator; to which said arbitrators or their umpire the said claim shall be referred."

On the 19th May, 1847, the Company sent Messrs Landor & Hughes the following notice:—

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"Whereas the North Staffordshire Railway Company require to purchase and take certain lands and hereditaments for the purpose of the North Staffordshire Railway (Pottery line) Act, 1846, situate in the parish of Prestburg, in the county of Chester, and which are wholly or part of the lands and hereditaments numbered 317, 401, 402, 413, 416, 417, and part of 422, in the plan and book of reference for the railway authorised to be constructed by the said recited Act for the said parish of Prestburg. And whereas on the 14th January last a notice of the intention of the North Staffordshire Railway Company to purchase and take for the purposes aforesaid the said lands and hereditaments was duly served on Thomas Landor, and on the 15th January last a notice of such intention was duly served on Richard Hughes and Robert Hughes, as the owners of, or as parties interested in the said lands and hereditaments, or as parties enabled by the Lands Clauses Consolidation Act, 1845, to sell and convey, or release the same lands and hereditaments to the said Company; and the said lands and hereditaments so required as aforesaid were, on the said notices so served on you as aforesaid, for better description delineated on the plan attached to each of the said notices so delivered therewith, and were therein distinguished by a red colour. And whereas they have stated the particulars of their claim in respect of the said lands and hereditaments to be, that such lands and hereditaments are of copyhold tenure, and you claim the sum of 3344*l.* 17*s.* 6*d.* as compensation for the same lands and hereditaments, and they and the said Company have not agreed as to the amount of compensation to be paid by the said Company for the interest in such lands belonging to them, or which they are by the Acts before recited and referred to enabled to sell, and for the damage to be sustained by them by reason of the execution of the works of the said railway. And whereas the said Thomas Landor, Richard Hughes, and Robert Hughes have, by notice in writing

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bearing date the 15th day of May instant, signified to the said Company their desire to have the question of such compensation settled by arbitration. Now I, the undersigned Jonathan Samuda, secretary to the said North Staffordshire Railway Company, do hereby nominate and appoint Thomas Kempson, of &c., as arbitrator on behalf of the said Company, to whom, with the arbitrator appointed by the said Thomas Landor, Richard Hughes, and Robert Hughes, shall be referred the question as to the amount of compensation to be paid by the said Company for the purchase of the said lands and hereditaments, or of the interest of the said Thomas Landor, Richard Hughes, and Robert Hughes therein, or for the interest of any other person or persons which by the said Acts hereinafter recited or referred to, you the said Thomas Landor, Richard Hughes, and Robert Hughes are enabled to sell, and also for the damage that may be sustained by the said Thomas Landor, Richard Hughes, and Robert Hughes, or such person or persons as aforesaid, by reason of the execution of the works of the said Company. Dated &c."

The arbitrators duly met, and appointed an umpire under the 27th section of the Lands Clauses Consolidation Act; the reference proceeded, and several meetings took place, when one Thomas Wright claimed compensation on the ground that he had an agreement for the renewal of an unexpired lease of the lands in question for a term of seven years from Christmas, 1846, under which agreement he had paid rent, and on the faith of which he had expended a large sum of money in erecting buildings, and a steam engine, &c. The arbitrators failed to make their award within the time limited by the 31st section of the Lands Clauses Consolidation Act, and on the 8th November the umpire made his award as follows:—

"I do hereby award and determine that the sum of 1861*l.* 2*s.* 6*d.* is the value, and shall be paid by the said

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North Staffordshire Railway Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, for the purchase of the fee simple in possession, free from all incumbrances of and in the said copyhold lands, tenements, and hereditaments described in the said first-recited notice, and delineated in the plan thereunto attached or delivered therewith, and therein coloured red, and required to be purchased and taken as aforesaid. And that the further sum of 1040*l.* 18*s.* 4*d.* shall be paid by the same Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, as compensation for the damage that has been or will be sustained by the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, by reason of the execution of the said railway and works, and also of the severing of the same lands and hereditaments from the other lands of the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, or otherwise injuriously affecting such other lands by the exercise of the powers of the said Lands Clauses Consolidation Act, 1845, or of the Act or Acts authorising the said railway and works, or any Act incorporated therewith, &c."

On the 16th December following, the Company's solicitor sent to the solicitor of Messrs. Landor & Hughes a copy of the award, and then gave them notice of Wright's claim, and stated, that in the event of his taking proceedings against the Company to obtain compensation, they would deduct the amount from the purchase-money. The solicitor of Messrs. Landor & Hughes on the 20th of December answered, that they considered Wright had no claim on them for compensation, and that they would not allow the Company to make any deduction from the purchase-money awarded. Wright's solicitor on the 27th December gave notice to the Company not to pay to

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Messrs. Landor & Hughes the sum awarded until an arrangement had been made with him. This rule was obtained upon the following, amongst other grounds:—"That the umpire has not in or by his award decided what is the amount of compensation to be paid by the North Staffordshire Railway Company for the interest of Thomas Landor, Richard Hughes, and Robert Hughes, in the lands and hereditaments in the award mentioned, required by the Company to be purchased and taken; that the said Thomas Landor, Richard Hughes, and Robert Hughes, having a limited interest only in the said lands and hereditaments, and not being enabled by the said Acts of Parliament in the award mentioned, or otherwise, to sell the interest therein of Thomas Wright, in the affidavit in this case mentioned, and such interest of the said Thomas Wright having been notified to and proved before the said umpire, he the said umpire ought to have awarded a distinct sum for the interest of the said Thomas Landor, Richard Hughes, and Robert Hughes; that, by his only awarding a gross sum for the fee simple in possession, free from all incumbrances, it cannot be ascertained what amount is to be paid to the said Thomas Landor, Richard Hughes, and Robert Hughes, for their interest in the said lands and hereditaments; that there is no machinery in the said Acts, or either of them, to apportion or ascertain the proportion of the said sum of 1861*l.* 2*s.* 6*d.* in the said award mentioned, which is to be paid to them, and the proportion thereof which is to be paid to the said Thomas Wright, or to any other incumbrancer or person entitled to any interest in the said lands and hereditaments; that the award is bad, because the said Thomas Landor, Richard Hughes, and Robert Hughes did not in and by their notice in the said award mentioned, or in or by their claim therein mentioned, or by the said appointment of arbitrator therein mentioned, or otherwise howsoever, state the nature of the interest belonging to them in the said lands and heredita-

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ments in respect whereof they claim compensation, or the particulars of their estate and interest in the said lands and hereditaments in respect whereof they claim compensation."

Martin now shewed cause(*a*).—One objection to this award is said to be, that the notice of the 15th of May is a defective submission to arbitration within the 18th and 25th sections of the Lands Clauses Consolidation Act; but if it be so, the Company cannot raise the objection after they have taken possession of the land. [*Parke*, B.—Looking at the submission and the award, it does not appear what interest these parties had in the lands, nor what is the value of their several interests. The umpire only awards, that if the parties are able to convey the fee simple, the value is so much.] In truth, the award finds that the interest of the parties is a fee simple in possession, and that 1861*l.* 2*s.* 6*d.* is its value. The umpire can only adjudicate on what the parties say they have: if it should afterwards turn out that they have not such interest, the proper course will be to proceed under the 76th and three following sections. [*Pollock*, C. B.—I think that we ought not to interfere. The point raised is at least doubtful, and it may be tried elsewhere. *Parke*, B.—The award undoubtedly appears to me to be bad for uncertainty. It is made in pursuance of a submission, which is not according to the statutory form, and I think that the award could not be enforced by attachment. On the other hand, it ought not to be set aside, because it is at least very doubtful whether the parties have not by their conduct agreed to that submission, though not according to the form given by the statute. The award ought to find the particular interest of the parties, whether in fee simple or for life, or for what other interest. There may

(*a*) Before *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

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have been some difficulty in the umpire deciding whether Messrs. Landor & Hughes were entitled to the fee or to a mere equitable interest, as they have not stated in their notice what interest they possess. What, then, did the parties intend to refer? The appointment of arbitrator is evidence of that intention. They agreed to refer the value of all the interest which Messrs. Landor & Hughes were capable of conveying; and the difficulty is, what is the umpire to do on that reference? He has neither valued the interest of Messrs. Landor & Hughes, nor has he found that they are entitled to the fee simple: he only says that the value of the fee simple is 1861*l.* 2*s.* 6*d.*, if they have the power of conveying it. *Platt*, B.—The umpire ought to have adjudicated on Wright's interest, and ought to have deducted that from the 1861*l.* 2*s.* 6*d.*] He was then stopped by the Court.

Crompton, contrà.—The award is clearly bad for not adjudicating on the several interests of the parties concerned. Wright's interest is not noticed, and the umpire awards one sum for the fee simple, leaving the parties to apportion that sum amongst themselves. The conduct of the parties cannot render the proceedings valid, because the Company, being a corporation, cannot be bound by any other than the statutory form of submission, except it be under seal. [*Parke*, B.—If the Company are not bound except by the statutory submission, they can neither sue or proceed by attachment.]

PER CURIAM.—This rule must be discharged, but without costs.

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May 4th.

In the Matter of an Arbitration *Between* the NORTH STAFFORDSHIRE RAILWAY COMPANY, *and* CHARLES WOOD AND RICHARD WOOD.

A Railway Company, requiring the property of landowners, gave notice to them, under the Lands Clauses Consolidation Act, to treat for it. The landowners thereupon gave notice to the Company that they were owners and lessees of the land, and that their interest therein was particularly described in a schedule served therewith; that they claimed, as compensation for the purchase-money, and for damage that might be sustained by the execution of the works, 2280*l.* 8*s.*; and that, if that sum was not paid, they desired to have the amount settled by arbitration, they thereby appointing their arbitrator,

THIS was a rule which had been obtained by *Crompton*, calling on the Messrs. Wood to shew cause why an award or umpirage should not be set aside under the following circumstances:—The North Staffordshire Railway Company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, gave Messrs. Wood notice to treat for the purchase of certain lands in Prestburg, in the county of Chester, and numbered 374, 375, 376, and 377 in the Company's plans and books of reference, and described in a plan annexed. This property consisted of a reservoir of water for supplying water-wheels of mills of the claimants. In June, 1847, the Company served the Messrs. Wood with another notice to treat for the purchase of other lands adjoining those before mentioned, and numbered 372 and 372 A. The Messrs. Wood thereupon appointed an arbitrator, and gave the Company notice "that we are the owners in fee simple and in copyhold tenure, and also lessees for a certain term yet unexpired, of the lands, tenements, and hereditaments mentioned or referred to in the said notices; and that such our interest therein, whether of a freehold, copyhold, or leasehold nature, is particularly described in the owner's schedule of claim served herewith; and that we claim as compensation for the purchase-money for the same, and for the damage

and requiring the Company to appoint an arbitrator on their behalf. In the schedule annexed was included certain pieces of land severed by the railway, and respectively of less than half an acre, which the landowners, under the 93rd section, required the Company to purchase. The Company thereupon served the landowners with a notice appointing an arbitrator, to whom was to be referred the amount of compensation to be paid by the Company for the purchase of the said lands. At the reference, the landowners gave evidence of the value of the small pieces of land mentioned in the schedule being respectively less than half an acre. The umpire awarded one entire sum for the purchase of the fee simple which the Company required, and for the small pieces mentioned in the schedule:—*Held*, that, as nothing had been submitted but the value of the land which the Company desired to purchase, and as one entire sum was awarded for that, and the small pieces of land which the landowners required the Company to take, the award was bad; but the Court refused to set it aside.

Whether the award could be supported by reference to the conduct of the parties, *Quære.*

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that may be sustained by us by reason of the execution of your railway works, the sum of 2280*l.* 8*s.*; and take notice, that we are ready and willing, on payment of the said sum of 2280*l.* 8*s.*, to sell, convey, release, surrender, and assign to you, the said Company, all our estate, right, title, and interest in the said lands, tenements, and hereditaments, according to the provisions contained in the said Acts of Parliament in your said notices mentioned. And we do further give you notice that we shall require you, in addition to such compensation, to preserve and re-connect in a proper and efficient manner, and without delay, all existing communications for the conveyance of water from the large moss pool to our present mills and factories in Sutton aforesaid. And further, take notice, that if our said claim of 2280*l.* 8*s.*, as and for compensation as aforesaid, shall not be paid or accepted by you, we hereby, in pursuance of the provisions contained in the said Act or any other Act or Acts of Parliament, signify to you our desire to have the amount of the said compensation to be paid to us, settled by arbitration. And we do hereby require you, the said Company, to appoint an arbitrator." To this notice there was a schedule annexed, by which the Messrs. Wood claimed—

£	s.	d.	
971	18	0	For the value of the land.
152	10	0	As compensation for the severance and injury to the adjoining land.
683	0	0	For damage done to the water privileges and severance.
473	0	0	For the purchase of parts of 372 A, 374, and 375, as not being lands within a town and built upon, and which would be cut through and divided by the railway, so that they would be left respectively of less quantity than half a statute acre.
2280	8	0	

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The Company, on the 7th of September, served the claimants with notice of the appointment of an arbitrator on their behalf, which, after reciting the Company's two notices to treat for the purchase, and that Messrs. Wood had stated the particulars of their claim in respect of the said lands to be 2280*l.* 8*s.*, proceeded:—

"Now we, the said North Staffordshire Railway Company, hereby, under the hand of me the said J. Samuda, secretary to the said Company, nominate and appoint G. C. P. arbitrator, to whom shall be referred the question as to the amount of compensation to be paid by the said Company for the purchase of the said lands and hereditaments, or of the interest of the said Richard Wood and Charles Wood therein, and for the interest of any other person or persons which, by the said Acts hereinbefore recited or referred to, they the said Richard Wood and Charles Wood are enabled to sell, and also for the damage that may be sustained by the said Richard Wood and Charles Wood, or such person or persons as aforesaid, by reason of the execution of the works of the said Company."

The arbitrators met, nominated an umpire, and proceeded with the reference, when the Messrs. Wood gave evidence of the value of those portions of the land numbered in their schedule 372 A, 374, and 375, the same being not within a town and built upon, and which would be cut through and divided by the railway, so that they would be left of less quantity than half an acre respectively, and which, they submitted, the Company were bound, under the 93rd section, to purchase (*a*). The arbitrators received this evidence, although it was objected to by the Company on the ground that it was not included in the lands specified or alluded to in the Company's appointment of an arbi-

(*a*) See this section, post, p. 30.

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trator, which constituted their submission. The arbitrators failed to make their award within the time limited by the Act, and thereupon the umpire made his umpirage, which, after reciting the notices, and that Messrs. Wood required the Company to purchase, along with the lands required for the purposes of the said railway and works, parts of the lands numbered 372 A, 374, and 375, the same being lands not within a town or built upon, which would be cut through and divided by the said railway and works, so that they would be of less quantity respectively than half an acre, and that they had no land adjoining into which the same could be thrown, so as to be conveniently occupied therewith, proceeded:—

"I do hereby award and determine, that the sum of 1444*l.* is the value, and shall be paid by the said North Staffordshire Railway Company to the said Charles Wood and Richard Wood, for the purchase of the fee simple in possession, and copyhold tenure and interest, free from all incumbrances, except the usual copyhold rent and services in respect of the said copyhold land and hereditaments, and also the leasehold interest, as set forth in the said claim of the said Charles Wood and Richard Wood, of and in the said lands, tenements, and hereditaments described in the before-recited notices, and delineated in the plans to the same notices respectively attached or delivered therewith, and therein coloured red, and required to be purchased and taken by the Company as aforesaid, and also required by the said Charles Wood and Richard Wood, in their notice and claim delivered to the Company to be purchased and taken by the said Company as aforesaid; subject, nevertheless, as to the said leasehold tenements, to a proportionate part of the said rent of 210*l.*, to which the same, with other tenements, is subject and liable, according to the quantity of land taken and to be apportioned under the provisions of the Lands Clauses Consolidation Act, 1845. And that

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the further sum of 732*l.* shall be paid by the same Company to the said Charles Wood and Richard Wood, as compensation for the damage that has been or shall be sustained by the said Charles Wood and Richard Wood, by reason of the execution of the said railway and works, and also of the severing of the same lands, tenements, and hereditaments from the other lands, tenements, and hereditaments of the said Charles Wood and Richard Wood, or otherwise injuriously affecting such other lands by the exercise of the powers of the said Lands Clauses Consolidation Act, 1845, or of the Act or Acts authorising the said railway and works, or any Act incorporated therewith."

The rule was obtained to set aside this award, upon the following, amongst other grounds: "That the umpire has exceeded his authority by awarding one gross sum for the purchase of the land required to be purchased and taken by the North Staffordshire Railway Company, and of the land required by Charles Wood and Richard Wood, in their notice and claim in the said award mentioned to be taken and purchased by the said Company, inasmuch as the umpire had no authority to award any sum in respect of the last-mentioned land—that is to say, the land required by the said Charles Wood and Richard Wood to be taken and purchased as aforesaid, or to make any award or umpirage as to such last-mentioned land; and as it cannot be known or ascertained from the said award how much of the said sum of money so awarded for the purchase is awarded in respect of the land required by the said Company, and how much is awarded in respect of the land required by the said Charles Wood and Richard Wood to be taken, the award is therefore bad altogether; that the umpire has included in his award, and awarded upon a matter not submitted to him—that is to say, the amount of the purchase-money of the land not required by the Company to be taken, but required by the said Charles Wood and

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Richard Wood to be taken; that the award or umpirage is void, as the two parties thereto never agreed upon the same subject-matter for the arbitrators or umpire to decide; and that the said Company only agreed that the award should be, as to the land required by them to be taken; whereas the said Charles Wood and Richard Wood agreed that the award should be both as to the land required by the Company to be taken, and the land required by themselves, the said Charles Wood and Richard Wood, to be taken; and the said Charles Wood and Richard Wood never agreed to be bound by any award or umpirage which should not include the amount to be paid for the purchase of the said last-mentioned land."

Martin and *Townsend* now shewed cause.—The umpirage is not bad. The Company were bound to give notice of the land that they required; and the owner, on his part, if he had any land within the description of the 93rd section (*a*), which he required the Company to take, was bound to give them notice thereof; and then the two notices formed a valid submission as to both. Besides, the Company, in their notice of the 7th of September, expressly

(*a*) 8 Vict. c. 18, s. 93. And with respect to small portions of intersected land, it is enacted as follows: "If any lands, not being situate in a town or built upon, shall be so cut through and divided by the works as to leave, either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters of the undertaking to purchase the same, along with the other land required for the purposes of the special Act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof have other land adjoining to that so left, into which the same can be thrown, so as to be conveniently occupied therewith; and if such owner have any other land so adjoining, the promoters of the undertaking shall, if so required by the owner, at their own expense throw the piece of land so left into such adjoining land, by removing the fences and levelling the sites thereof, and by soiling the same in a sufficient and workmanlike manner."

refer to the claimants' demand of 2280*l.* 8*s.* as compensation for land *mentioned in the notice.* But the parties have concluded themselves, by their conduct before the arbitrators, and cannot now object: *Reg.* v. *The Trustees of Swansea Harbour* (*a*). [*Parke*, B.—What the Company proposed to refer was, the amount of compensation to be paid by them for the land that they were willing to take; and it is clear that the umpire has awarded a sum for the entire lands, and on that ground it is bad. But whether we ought to interfere, is another question.]

Crompton, contrà, submitted that the umpire had awarded on a subject not referred, inasmuch as the value of the small pieces of land was not a subject of reference; and as the umpire had awarded an entire sum for that and the other property, the award was bad and ought to be set aside.

POLLOCK, C.B.—I think that this rule must be discharged, but, under the circumstances, without costs.

PARKE, B.—I am of the same opinion. This award is clearly bad, and cannot be enforced. Nothing is submitted to the arbitrators but the value of the land required by the Company to be taken. Whether the award can be supported by reference to the conduct of the parties, is another matter.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

(*a*) 8 A. & E. 439.

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COURT OF EXCHEQUER.

Trinity Term, 1848.

WILLEY *v.* PARRATT and Others.

June 1*st*.

The plaintiff applied to the committee of management of a Railway Company for shares, and undertook to accept the same or any number that might be allotted to him, and to pay the deposit of 2*l*. 2*s*. per share, and to execute the subscribers' agreement, as might be required. The letter of allotment, allotting to him 100 shares, was headed "Not transferable," and indorsed on it was a memorandum that the committee of management, being of opinion that it would be an accommodation to the subscribers if they were allowed the option of either paying the whole or a portion of their respective deposits at present, and the remainder at a future day, and considering it unnecessary to lock up the large sum of money over and above what any expenses could require, informed him that the bankers were authorised to receive, in part of his deposit, 10*s*. per share before the 17th of November. This the plaintiff duly paid. In an action by the plaintiff to recover back this deposit, the scheme having been abandoned:—*Held*, First, that the contract to subscribe arose from the offer contained in the letter of allotment, and the acceptance of it by the plaintiff's complying with its terms and paying the deposit; and the entire contract, not being in writing, could not be stamped. Secondly, that the deposit was paid for defraying the preliminary expenses, and, being so applied, the plaintiff could not recover any part of it back.

Semble, that the 7 & 8 Vict. c. 110, s. 23, does not forbid the receipt of more than for preliminary expenses.

ASSUMPSIT for money paid, money had and received, and on an account stated.

Plea, non assumpserunt.

The cause was tried at the London Sittings after Michaelmas Term, 1847, before *Pollock*, C. B., when it appeared that the action was brought to recover from the defendants, members of the committee of management of a projected railway Company, "The Direct London, Portsmouth, Chichester, and Direct Portsmouth and Chatham Railway Company," the sum of 50*l*. paid by him as a deposit on 100 shares in the Company, allotted to him.

On the 6th of October, 1845, the plaintiff sent to the committee of management the following application for shares:—

"Gentlemen,—I request you will allot to me 200 shares of 20*l*. each, in the above-named Company, and I hereby undertake to accept the same, or any number that may be allotted to me, and to pay the deposit of 2*l*. 2*s*. on each such share, and to execute the parliamentary contract and subscribers' agreement, as may be required of me.

"R. WILLEY."

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To which the plaintiff received from the defendant the following letter of allotment:—

"Not transferable. Direct London, Portsmouth, Chichester, and Direct Portsmouth and Chatham Railway Company. No. 1381, Shares 100. 1 A, Adelphi Terrace, Strand, London, 11th Nov. 1845. *Deposit, 2l. 2s. per Share, amounting to* 210*l.*"(*a*).

The following memorandum was indorsed on the letter of allotment:—

"The Committee of Management being of opinion that it would be an accommodation to many of the subscribers, if they were allowed the option of either paying the whole or a portion of their respective deposits at present, and the remainder at a future day; and considering it unnecessary to lock up the large sum of money over and above what any expenses could require, in the present state of the money market, there being no absolute necessity for so doing; I am directed further to inform you, that the bankers of the Company have been authorised to receive, in part of your deposit, the sum of 50*l.*, being 10*s.* per Share on the Shares allotted you, on or before Thursday the 17th of November instant, and the remaining 1*l.* 12*s.* per Share, on or before the 8th of January next."

It also appeared that the deposits had been expended in preliminary expenses, and that the scheme had become abortive.

At the trial, there were two objections made to the action:—*First*, That the application for shares, and letter of allotment, ought to have been stamped. *Secondly*, That the memorandum on the letter of allotment provided for the application of the deposits in payment of the expenses, and,

(*a*) These words in italics were scored over.

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being so applied, they could not be recovered back. The learned Judge overruled the first objection; but, on the second objection, he ruled, that, under the 7 & 8 Vict. c. 110, s. 7, the committee of management were not authorised to retain more than 2*s.* 6*d.* per share for preliminary expenses, and he directed a verdict for the plaintiff, giving the defendants leave to move to enter a nonsuit. A rule nisi having been accordingly obtained for a nonsuit or new trial,

Martin and *Cleasby* now shewed cause.—*First*, no stamp was necessary, as there was no perfect contract in writing. The application for shares, and letter of allotment, do not constitute the contract under which the deposit was paid, the application being for shares on certain terms, and the allotment being of shares on other terms, namely, on the condition that they should not be transferable: *Vollans* v. *Fletcher* (*a*), *Duke* v. *Andrews* (*b*). As to the *second* point, the deposits are composed of 10 per cent. on the shares, and 2*s.* 6*d.* for expenses, and the plaintiff is at any rate entitled to recover back the excess above the 2*s.* 6*d.* per share, as the Act does not authorise a larger expenditure in preliminary expenses, and the directors never went to Parliament. The indorsement on the letter of allotment must refer to the preliminary expenses authorised by Parliament. [They cited *Nockels* v. *Crosby* (*c*), *Walstab* v. *Spottiswoode* (*d*), *Burnside* v. *Dayrell* (*e*)].

Sir *Frederick Thesiger* and *Ogle*, contrà.—*First*, The application for shares, and letter of allotment, constitute a complete contract, and ought to have been stamped. The plaintiff says, "I will accept shares, and pay the deposit, and execute the agreement, as may be required of me;" and the letter of allotment is an acceptance of that proposal. *Vollans* v. *Fletcher* is distinguishable, because there

(*a*) Ante, Vol. 5, p. 73; 1 Exch. 20.
(*b*) Ante, Vol. 5, p. 496; *S. C.*, 2 Exch. 290.
(*c*) 3 B. & C. 814.
(*d*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.
(*e*) 3 Exch. 224; post.

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there was a power of cancellation introduced inconsistent with the application for shares. [*Pollock*, C. B.—Are not the application and allotment both proposals? *Alderson*, B.—Not transferable is a new term introduced into the proposed contract, and therefore the allotment is not an acceptance. The allotment is the proposed contract, which is accepted by the payment of the deposit; and then you cannot stamp the contract, because it is not stampable.] *Secondly*, The plaintiff is not entitled to recover back any portion of the deposit. The action for money had and received depends on equitable circumstances; and unless the plaintiff has done equity he cannot ask for equity. Now, if the plaintiff had paid up his deposits, the scheme would have turned out prosperous; and inasmuch as it has become abortive, through his default in not performing his part of the contract, he has no ground of complaint. This distinguishes the case from *Walstab* v. *Spottiswoode*(*a*), in which the plaintiff had done all that was required, and had fulfilled her part of the contract; but here the plaintiff's claim arises out of his own default. The deposits having been expended in preliminary expenses, the plaintiff is estopped from claiming his money back by the memorandum on the letter of allotment; and, primâ facie, there is nothing illegal in applying the whole of the deposits in payment of preliminary expenses: *Garwood* v. *Ede*(*b*), *Clements* v. *Todd*(*c*), *Jones* v. *Harrison*(*d*). [*Pollock*, C. B.—The letter of allotment, coupled with the payment of the deposit, seems to put the plaintiff in the same situation as if he had signed the agreement, as in *Garwood* v. *Ede*.] They also cited *Ex parte Clarke, In re The Tring, Reading, &c. Railway Company*(*e*).

Cur. adv. vult.

(*a*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.

(*b*) Ante, Vol. 5, p. 134; *S. C.*, 1 Exch. 264.

(*c*) Ante, Vol. 5, p. 132; *S. C.*, 1 Exch. 268.

(*d*) Ante, Vol. 5, p. 138; *S. C.*, 2 Exch. 52.

(*e*) 17 L. J., Bank., 13.

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POLLOCK, C. B., now delivered the judgment of the Court. —This was an action to recover back a deposit. The plaintiff recovered a verdict at the trial, and a motion was made to set aside that verdict and for a new trial, upon two grounds; *first*, because the letter of allotment required a stamp, and it not being stamped, and forming the ground of action, therefore the case of the plaintiff failed. The *second* ground upon which the defendants moved, and which was for a new trial, was because the deposit had been applied to certain expenses, which were intimated in the letter of allotment under which the plaintiff claimed. With respect to the first objection, we are of opinion that the letter of allotment did not require a stamp. The plaintiff applied for shares by a letter offering certain terms; the letter of allotment allotted shares on different terms. These two letters did not constitute any agreement between the parties; the contract arises from the offer contained in the letter of allotment, and the acceptance of it by the plaintiff, by complying with the terms in paying the money. The entire contract between the parties, therefore, is not in writing, and cannot be stamped. On the authority of *Vollans* v. *Fletcher*, we are of opinion that the letter of allotment was properly received in evidence without a stamp; and therefore the first ground for a new trial fails.

The motion was made also on another ground, namely, because the deposit was not applied to the precise purpose for which it was paid; and so the contract on which it was deposited was rescinded. The directors, in their letter of allotment, point out that they call for 10*s.* per share, considering it unnecessary to lock up money not necessary for expenses. The plaintiff here has paid 50*l.*, that is, 10*s.* per share for 100 shares, which, according to the allotment, was to be paid towards the expenses. There was no evidence that it was not so applied; on the contrary, the evidence was that it had been so applied. The ground of our decision in *Walstab* v. *Spottiswoode*, and in many simi-

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lar cases was, that the object for which the money was deposited had become impossible. The money was there deposited for the purpose of forming a Company, and carrying on a project which had been abandoned; and so the object of the deposit had come to an end, and the money in the hands of the depositee was money had and received to the use of the depositors. That is not the case here; the 10s. per share was deposited for a specific object, that is, the payment of the expenses, which means the preliminary expenses; and if these deposits had been so applied —and there was evidence that they had been—the plaintiff had no right to complain, and cannot recover anything back. The rule for a new trial, therefore, must be made absolute.

If there be anything in the point, that the Act of Parliament forbids the receipt of more than a certain amount for preliminary expenses, that point may be raised by the plaintiff on the new trial, if he thinks fit to tender a bill of exceptions on that point; but at present it appears to us that if, by the contract between the parties, money is advanced, with the stipulation that it is to be expended in preliminary expenses, the party so depositing cannot receive back the money if the scheme fails, and if it appears that the money has been so expended.

Rule absolute.

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COURT OF QUEEN'S BENCH.

Easter Term, 1848.

May 1*st*.
Nov. 25*th*.

In an action against a provisional committeeman of a Railway Company, for work, &c., it appeared that the defendant had authorised the pledging of his credit for a portion of the work, but not for the residue, and had subsequently admitted his liability *for the whole*. The judge directed the jury to consider the circumstances under which the admission was made, and the mistaken view under which the defendant might at that time have acted in respect of the supposed liability of all members of provisional committees:—*Held*, that the direction was right.

NEWTON and Another *v.* BELCHER.

ASSUMPSIT for work and labour, and for publishing advertisements.

Pleas, non assumpsit, and payment.

The cause was tried at the London Sittings after Hilary Term, 1847, before *Erle*, J.—It appeared that the action was brought by the plaintiffs, advertising agents, against the defendant, as a provisional committee-man of the Oxford and Salisbury Direct Railway Company. The advertisements were inserted by the directions of the solicitors and secretary, in 1845; and on the 7th and 15th of October the solicitors, Messrs. Elmslie & Preston, sent orders to the plaintiffs to insert a prospectus of the Company in all the papers, "until further notice." The defendant had consented to be one of the provisional committee as early as the 8th of October; but this was upon an assurance that he would incur no personal responsibility. At a meeting of the provisional committee, held on the 15th of October, the defendant being present, it was resolved to form the Company for making a railway according to the prospectus already published, and a managing committee was then appointed, of which the defendant was one, taking an active part in the proceedings. The scheme having become abortive, in January, 1846, was abandoned; and, at a meeting of the provisional committee, at which the defendant presided, it was resolved, that the affairs of the Company should be placed in the hands of Messrs. Abbott & Bennett, in order that the accounts

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might be investigated and arrangements made for final settlement; accordingly, Messrs. Abbott & Bennett, in May, 1846, drew up a statement of the debts of the Company, containing, amongst other items, "Newton & Co., (advertising agents), 4288*l.* 6*s.* 4*d.*" Copies of this were forwarded to the shareholders and allottees, for the purpose of getting contributions.

In leaving the case to the jury, the learned Judge directed them, that, in considering whether the defendant was liable before the 15th of October, 1845, the mere consent of the defendant to the insertion of his name in the advertisements as a provisional committee-man was no evidence against him, and that, in estimating the effect to be given to the resolution of the 26th February, 1846, he directed them to consider what was generally understood in 1845 and 1846 as to the liability of provisional committee-men, for debts contracted on behalf of the Companies, and to qualify the admission accordingly. The jury found that the defendant was liable for orders given on and after the 15th of October, 1845; a verdict was thereupon entered for the plaintiff on the first issue, damages 877*l.* 4*s.* 4*d.*, and for the defendant, on the second.

A rule having been obtained by the plaintiffs, calling upon the defendant to shew cause why the damages should not be increased, or why there should not be a new trial,

Sir *F. Thesiger* and *Bramwell* now shewed cause (*a*).—As to the circular letter of Messrs. Abbott & Bennett, that is evidence only, of the liability of the Company, but not of the defendant; at any rate, that cannot of itself create a liability if the facts shew that the defendant was not legally liable: *Saville* v. *Robertson* (*b*), *Beale* v. *Mouls* (*c*). As to the

(*a*) Before *Denman*, C.J., *Patteson*, J., *Wightman*, J., and *Erle*, J.

(*b*) 4 T. R. 720.

(*c*) Ante, Vol. 5, p. 105; *S. C.*, 10 Q. B. 976.

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jury to consider the circumstances under which it was made, the difference between trading partnerships and joint-stock companies, and the mistaken view under which the defendant at that time might have acted in respect of the supposed liabilities of all members of provisional committees; but the same line of observation has been before held correct in this Court; and as a general rule, the jury, who are to estimate the weight due to an admission, have a right to attend to the circumstances under which it was made.

Rule discharged(*a*).

(*a*) See next case.

COURT OF QUEEN'S BENCH.

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The effect of an admission may be altered if the admission arise from a mistake in law. The general doctrine, that a party is at liberty to prove that an admission made by him was mistaken or untrue, and is not estopped by it, unless another person has been induced by it to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of fact.

THIS was an action on the same demand as in the case of *Newton* v. *Belcher*(*b*). The evidence was, in many respects, the same as in that case, with the exception, that here no bill of particulars in the action had been delivered. But a bill of the plaintiff's demand had been delivered before action brought, which was proved to be *literatim* the same as the bill of particulars in *Newton* v. *Belcher*. The case of the plaintiff was conducted on the principle that this bill contained his demand. His clerk said it was copied from his ledger; and the defendant's case, who pleaded payment of 1000*l*., was conducted avowedly on the principle, that he

(*b*) See the preceding case.

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was liable only for the items in his bill on and after the 15th of October; and the payment of the 1000*l.* was proved by putting in the particulars in *Newton* v. *Belcher*, and shewing that the 1000*l.* paid by Belcher in respect of that bill of particulars was applicable to the bill now in dispute.

The cause was tried at the London Sittings after Trinity Term, 1847, before *Erle*, J., who directed the jury, that the question was, whether the persons who gave the orders prior to the 15th of October had authority to bind the defendant. The learned judge told the jury, that, when the question first came before the Courts, it was held, that a person, whose name appeared on the provisional committee of a railway, was liable for the debts of the concern; but this doctrine was afterwards repudiated, and that it was then necessary to shew that the particular contract was entered into by the authority of the defendant. That the letter of the 5th of May, 1846, amounted to a ratification of the contract by the defendant, if he was aware of his legal liability and intended to adopt it. He told them to consider what, at the time of writing that letter, pervaded the community as to the law on this subject, as this consideration might account for the acts of parties at that time, and for the defendant endeavouring to make arrangements for paying the debts; that the jury were at liberty to say what was the effect of that letter as an admission, and that it would not throw on the defendant a greater amount of responsibility than the law would cast on him.

The jury found, that the defendant was liable for advertisements inserted on and after the 15th of October.

A rule having been obtained by *Montague Chambers*, for a new trial, on the ground of misdirection,

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Bramwell shewed cause.

Montague Chambers, in support of the rule, cited *Reynell* v. *Lewis* (*a*), *Wyld* v. *Hopkins* (*b*), *Hagedorn* v. *Oliverson* (*c*), *Robinson* v. *Gleadow* (*d*), Storey on Agency, p. 206.

Cur. adv. vult.

Nov. 25th. Lord DENMAN, C. J., after stating the facts as before set out, continued—As to the points common to this case with that of *Newton* v. *Belcher*, they have been disposed of there. Mr. *Chambers* relied on one additional ground for a new trial, namely, that it was a misdirection to tell the jury that the effect of an admission by the defendant could be altered, if the admission arose from a mistake in law, relying on an analogy to the rule preventing the recovery back of money paid under a mistake in law; but no authority was cited in support of this supposed rule as applicable to admissions: and, on the contrary, admissions are frequently qualified on that ground. The general doctrine laid down in *Heane* v. *Rogers* (*e*), that the party is at liberty to prove that his admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of fact.

Rule discharged.

(*a*) Ante, Vol. 4, p. 351; *S. C.*, 15 M. & W. 517.
(*b*) Ib.
(*c*) 2 M. & S. 485.
(*d*) 2 Bing. N. C. 156.
(*e*) 9 B. & C. 577.

COURT OF EXCHEQUER.

Trinity Term, 1848.

TURNER *v.* THE METROPOLITAN LIVE STOCK COMPANY. *June 16th.*

The returns of the names of shareholders of a Joint-stock Company under the 7 & 8 Vict. c. 110, are sufficient primâ facie evidence of the fact of those persons being shareholders, in order to justify the Court in issuing execution against them under sect. 68 of that Act. The notice required by that section to be given to the shareholder need not be personally served on him.

THIS was a rule, obtained by *Gray* on behalf of the plaintiff, a judgment creditor of the Company, calling upon Louis de Droff, a shareholder of a Joint-stock Company completely registered under the 7 & 8 Vict. c. 110, to shew cause why execution should not issue against him under the 68th section of the 7 & 8 Vict. c. 110, which enacts, "that, in the cases provided by this Act, for execution on any judgment, decree, or order in any action or suit against the Company, to be issued against the person, or against the property and effects of any shareholder or former shareholder of such Company, or against the property and effects of the Company, at the suit of a shareholder or former shareholder, in satisfaction of any monies, &c., in any action or suit against the Company, such execution may be issued by leave of the Court, &c., on notice, without previous suggestion or scire facias: provided also, that no such motion shall be made, nor summons granted, for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the person sought to be charged thereby." The affidavit upon which the rule had been obtained had annexed to it a certified copy of the return of the names of shareholders under the Act, in which was the name of Louis de Droff.

Bramwell now shewed cause (*a*).—There is not sufficient evidence before the Court that the party sought to be

(*a*) Before *Pollock*, C. B., *Alderson*, B., and *Platt*, B.

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charged was a shareholder. The certified copy of the return is only evidence that the return was made, and nothing more (*a*). The return is no evidence against a supposed shareholder, unless it be shewn that he has in some way sanctioned it. Besides, the notice required by the Act has not been personally served.

ALDERSON, B.—The return is made by the registrar, in pursuance of a public duty; and the fact that a party's name appears on that return as a shareholder, is a sufficient primâ facie case to induce the Court to act as if the party was proved to be a shareholder, when he has an opportunity of denying it, and does not. It is not as if the question was whether it was evidence for a jury. As for the notice, the party must have ten days' notice so brought home to him as to enable him to appear; but the Act is silent as to its being personal notice.

Gray appeared in support of the rule, but was not called upon.

Rule absolute.

(*a*) The 18th section enacts, "That every person shall be at liberty to inspect the returns, deeds, registers, and indexes, which shall be made to, or kept by, the said registrar of Joint-stock Companies, &c.; and that any person shall be at liberty to require a copy or extract of any such return or deed, to be certified by the said registrar; and there shall be paid for such certified copy or extract such fee as the Commissioners of her Majesty's Treasury may appoint in that behalf &c.; and that, in all courts of law and equity, and elsewhere, every such copy or extract, so certified, shall be received in evidence, without proof of the signature thereto, or of the seal of office affixed thereto."

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COURT OF EXCHEQUER.

Michaelmas Term, 1849.

BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY *v.* BROWNRIGG and Others. *Nov. 7th.*

DEBT for calls.—The declaration stated, that the defendants, before and at the time of the commencement of this suit, to wit, on &c., were, and still are, the holders of divers, to wit, twenty shares in the said Company, and being such holders as aforesaid, were, at the time of the commencement of the suit, and still are, indebted to the plaintiffs in a large sum of money, to wit, 145*l.*, in respect of five several calls upon each of the said shares, theretofore duly made by the said Company, whereby and by reason of the said sum of 145*l.* being and remaining wholly unpaid to the plaintiffs, an action had accrued to the plaintiffs by virtue of the Companies Clauses Consolidation Act, 1845, and by virtue of the Birkenhead, Lancashire, and Cheshire Junction Railway Company's Act, 1846, to demand from the defendants the said sum of 145*l.*, &c.

Plea, never indebted.

The cause was tried at Chester, before *Maule*, J., at the Summer Assizes, 1849, when it appeared, that, on the formation of the Company, in 1846, twenty shares in the Company were allotted to the defendants and one Duff Gordon, as trustees. The allotment was duly notified to the defendant Brownrigg, and he accepted the shares for himself and co-trustee, and paid several calls upon them. At the trial, in order to connect the defendants, the sealed register and the alphabetical register were put in; on the former the defendants were entered as "Brownrigg and Others, trus-

The plea of never indebted, to an action of debt for calls, puts in issue all the material allegations in the declaration, and, amongst them, the fact of the detendant being a shareholder.

The entry on the sealed register of the defendants, as B. "and others, trustees," is not a sufficient entry so as to be evidence of the defendants' being shareholders within the 8 Vict. c. 16, s. 18.

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tees," but on the latter the names of the defendants were entered in full. It was thereupon contended, on behalf of the defendants, that they were not liable, unless on the sealed register, and, inasmuch as Brownrigg alone was on that register, there was no evidence of a joint liability. In answer to this objection, it was contended, on behalf of the plaintiffs, that on the pleadings it was admitted that the defendants were shareholders, and that they were estopped from denying that fact. The learned Judge thought otherwise, and directed a verdict for the defendants, giving the plaintiffs leave to move to enter the verdict for them.

Welsby now moved (*a*).—On the pleadings it is admitted that the defendants are shareholders, and the only fact in issue is, the making of the call. Here the declaration does not follow the statutory form; it alleges that the defendants *were and still are* the holders of shares, and these facts are admitted. [*Parke*, B.—Never indebted puts in issue all the facts necessary to the accrual of the debt.] At any rate, there was some evidence against the defendants; they are correctly entered on the alphabetical register, and Brownrigg has paid calls; this is evidence as against both. [*Alderson*, B.—The statute makes the register, (which has been held to mean the sealed register,) evidence against third persons; and, being made by the Company in their own favour, such a provision ought to be strictly followed.] He referred to *Belfast and County Down Railway Company* v. *Strange* (*b*).

PARKE, B.—I think that the learned Judge was right in his ruling. Never indebted puts in issue all the material allegations in the declaration; and it is a material allegation that the defendant was a shareholder at the time of the call being made. The register, which is made primâ facie

(*a*) Before *Parke*, B., and *Alderson*, B.

(*b*) Ante, Vol. 5, p. 548; *S. C.*, 1 Exch. 739.

evidence, is the sealed register (*a*). The entry on that register is "Brownrigg and Others, Trustees," and the name of Taylor is not mentioned; it is, therefore, no evidence as against him; and there is no other evidence that he had agreed to receive the shares which have been allotted to him and his co-trustees. There will, therefore, be no rule.

Rule refused.

(*a*) *The Newry and Enniskillen Railway Company* v. *Edmonds*, Ante, Vol. 5, p. 275; *S. C.*, 2 Exch. 118.

COURT OF COMMON PLEAS.

Easter Term, 1849.

RICHARDS *v.* THE LONDON AND SOUTH COAST RAILWAY COMPANY.

May 5th.

CASE.—The first count stated, that whereas the defendants, before and at the time of the delivery of the dressing-case, goods, and chattels to them, and the committing of the grievances as hereinafter mentioned, were the owners and proprietors of a certain railway, to wit,

A carrier who undertakes to convey a passenger with his luggage, is bound to deliver it to him at the end of the journey, though it may be in the same carriage with him, and under his personal care; and if the usual course of delivery is at a particular spot, that is the place of delivery. The declaration stated that the defendants were common carriers for hire on a railway from W. to the S. terminus; that the wife of the plaintiff became a passenger to be conveyed from W. to the S. terminus with her luggage, consisting of a dressing-case and other goods, which were also to be conveyed to the S. terminus, and to be safely delivered there; that the defendants did not use due or proper care about the carriage of the dressing-case; that, through their carelessness, the same became lost to the plaintiff. It appeared that the plaintiff's wife became a passenger from W. to the S. terminus; and, on taking her seat, her dressing-case was placed in the carriage with her; and, on her arrival at the S. station, she was placed in a hackney-coach with her luggage by the Company's servants. The dressing-case was lost, but when, it did not appear, though it was not seen in the hackney-coach, nor missed, until the arrival of the lady at her destination:—*Held*, that the allegation of negligence being unnecessary, the plaintiff was not bound to prove it; and that, on proof of the receipt and non-delivery, the plaintiff was entitled to a verdict; consequently, that the evidence supported the declaration.

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a railway from a certain place or railway station, called Woodgate Station, in the county of Sussex, to a certain railway station or terminus of the defendants, in the borough of Southwark, in the county of Surrey, and of certain engines and carriages used by them for the carriage and conveyance therein and thereon of passengers and their luggage, and of goods and chattels, in, upon, and along the said railway, from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, and from the said station or terminus at Southwark aforesaid to Woodgate Station aforesaid, for hire and reward to them the defendants in that behalf; and the defendants were, during all the time aforesaid, common carriers for hire, on, in, and upon the railway aforesaid, and between the places aforesaid; and being such owners and proprietors as aforesaid of the said railway and the said engines and carriages, for the purpose aforesaid, and such common carriers as aforesaid, heretofore and before the commencement of this suit, to wit, on the 10th of November, 1846, one Charlotte Susannah Richards, the wife of the plaintiff, at the request of the defendants became and was a passenger in, upon, and along the said railway of the defendants; and the defendants then received into one of their said carriages, in and upon their said railway, the said Charlotte Susannah as a passenger in, upon, and along the said railway, to be carried and conveyed therein and thereby, from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, together with her luggage, consisting of a certain dressing-case, and certain other goods and chattels of the plaintiff, to wit, &c., also to be carried and conveyed by the defendants as such carriers as aforesaid, in, upon, and along the said railway, from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, and there, to wit, at the said station or terminus at Southwark aforesaid, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants

in that behalf. Yet the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the said dressing-case, goods, and chattels of the plaintiff, from Woodgate Station aforesaid to the station or terminus at Southwark aforesaid, but took so little and such bad care in and about the carrying and conveying of the said dressing-case, goods, and chattels, that by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the said dressing-case, goods, and chattels, then became and were wholly lost to the plaintiff.

There were two other counts, which are immaterial to the decision.

Plea, amongst others, the general issue.

The cause was tried at the London Sittings after Trinity Term, 1848, before *Wilde*, C. J., when it appeared, that the action was brought to recover the value of a dressing-case and its contents, which had been lost under the following circumstances:—The plaintiff's wife having taken a ticket at the Woodgate Station, on the Brighton Railway, for London, was placed in one of the carriages of the Company, assisted by her servant; a portion of her luggage was placed in the van, and her dressing-case, which was the subject of this action, was placed in the carriage in which she was about to travel, under her seat. On the arrival of the train at the London terminus, the lady was lifted from the Company's carriage into a hackney coach, which was at the side of the platform, and to which her luggage was carried by the Company's servants. The dressing-case was not seen in the hackney-coach, nor was it missed until the lady's arrival at her destination. His Lordship directed a verdict for the plaintiff, giving the defendants leave to move.

Talfourd, Serjt., having obtained a rule for a nonsuit, or to enter the verdict for the defendants,

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Byles, Serjt., and *Bovill*, now shewed cause (*a*). The defendants were bound safely to deliver the dressing-case at the London Station, and the fact of its being under the personal inspection of the passenger cannot limit that responsibility: *Robinson* v. *Dunmore* (*b*), *Calye's case* (*c*). Then, does the evidence support the first count? The duty is alleged to be to convey *from* the Woodgate Station *to* the Southwark Station, which includes those places: *Pim* v. *Curell* (*d*), *The North and South Shields Ferry Company* v. *Barker* (*e*), *Ditcham* v. *Chivis* (*f*), *Beckford* v. *Crutwell* (*g*). They were therefore bound to *deliver*, at the platform or at the coach, which they did not. [They also cited *Bourne* v. *Gatliff* (*h*), *Walker* v. *Jackson* (*i*), *Pickford* v. *The Grand Junction Railway Company* (*k*), *Machu* v. *The London and South Western Railway Company* (*l*), *Muschamp* v. *The Lancaster and Preston Junction Railway Company* (*m*), *Hyde* v. *The Trent Navigation Company* (*n*), Story on Bailments, 538.]

Talfourd, Serjt., and *Bramwell*, in support of the rule.—There was no delivery of the dressing-case to the Company, but it was always in the custody of the passenger, and therefore no duty was cast on the defendants, except to convey the passenger safely with the luggage that was delivered to them. Would the Company be liable for the loss of the passenger's shawl, or of anything that she might lose from her pocket? Clearly not; nor would they of anything that she retained the personal charge of. She might have opened

(*a*) Before *Wilde*, C. J., *Cresswell*, J., and *V. Williams*, J.
(*b*) 2 B. & P. 419.
(*c*) 8 Rep. 32; *S. C.*, 1 Smith L. C. 47.
(*d*) 6 M. & W. 234.
(*e*) 2 Exch. 136.
(*f*) 4 Bing. 706.
(*g*) 1 Moo. & Rob. 187.
(*h*) 3 Scott N. R. 1; *S. C.*, Id. 604.
(*i*) 10 M. & W. 161.
(*k*) Ante, Vol. 3, pp. 193, 538; 12 M. & W. 766.
(*l*) Ante, Vol. 5, p. 302; *S. C.*, 2 Exch 415.
(*m*) Ante, Vol. 2, p. 607; 8 M. & W. 421.
(*n*) 5 T. R. 389.

the dressing-case on the road, and taken out some of the jewelery; would the Company then be liable? But if there was a delivery to the Company, the duty was to convey safely to the station, and on the arrival at the platform, the obligation of the Company ceased; and there is no pretence of a breach of duty until after the arrival. But the gist of the action is negligence in conveying, and not the non-delivery, of which there was no evidence.

WILDE, C. J.—Looking at the facts of this case, and applying the general principles of law to them, it appears to me that the plaintiff has proved enough to entitle him to judgment on the first count, and this makes it unnecessary to consider the other counts. That count alleges that the defendants were common carriers for hire upon the railway; and they being such common carriers, the plaintiff's wife became a passenger, and the defendants received her and her dressing-case, which was part of her luggage, to be safely and securely carried to, and to be delivered at, the railway station at Southwark; that the defendants, not regarding their duty, did not use due and proper care about the carriage and conveyance of the dressing-case, goods, and chattels, whereby they became lost to the plaintiff. Now, the duty of common carriers is well understood; they give a warranty safely and securely to convey and deliver. It is immaterial whether there be negligence or not; the warranty is broken by the non-delivery. What, then, is the result of the first count, it being clear that when unnecessary matter is stated, the plaintiff may recover, if he proves enough to entitle him to do so? It was not necessary for the plaintiff to prove negligence, except in this respect, that the dressing-case had not been re-delivered; and he was entitled to a verdict on proof of the receipt and non-delivery. The result is, that Mrs. Richards and the dressing-case were received to be carried from the Woodgate Station to the Southwark

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Station, and to be there delivered; and that the dressing-case, by the improper conduct of the defendants, was not delivered, but lost. The defendants receiving goods to convey and deliver, were under an obligation as large as that of common carriers; and nothing was shewn in point of law to relieve them from that obligation. But it is objected, that the contract was to convey, and that Mrs. Richards and her dressing-case were carried from Woodgate to Southwark; but the charge is, that the dressing-case was to be conveyed and delivered there, and was not. The facts of the case are very simple. The lady, on arriving at the Woodgate Station, had the bulk of her luggage paid for and put in the van, and her dressing-case into the carriage, in which she was about to travel. Nothing is more common than for persons to put part of their luggage in the same carriage with them; and that may be done under such circumstances as never to cast any responsibility on the carriers,—that, however, is to be proved by them; but a passenger taking a valuable article openly and notoriously in the same carriage in which he travels will not relieve the Company from responsibility. The case is quite different from that of goods which are about the person of a passenger, which must be considered entirely under his personal control and custody, and never delivered to or accepted by the carrier. Acceptance by the Company is the legal result of goods placed in their hands in the ordinary way in which they consent to receive them. Taking this case, therefore, as free from any facts which could have warranted the jury in coming to a conclusion that there had been fraud in the transaction, on the part of Mrs. Richards, I think that the plaintiff proved enough to entitle him to a verdict on the first count.

CRESSWELL, J.—I am of the same opinion. It seems to me that there was abundant evidence to sustain the first count, and to prove that the parcel was put into the car-

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riage under such circumstances as to make the defendants liable as common carriers of passengers and goods. It cannot be said that the Company fulfilled what they undertook to do, if they did not deliver the parcel in the usual course; and the usual course of delivery was to deliver on the other side of the platform. That would be the place at which they would be bound to deliver. In *Bourne* v. *Gatliffe* (*a*), a question was raised as to the course of delivery; but it is unnecessary to consider that question here, because there was no delivery at all. The parcel was put into the carriage to be conveyed and delivered, and was not. The only question, then, is, whether the statement of the breach in the declaration is sufficient. In the case of common carriers, it is not necessary to aver negligence: *Forward* v. *Pittard* (*b*). Here there is an allegation, that, by reason of the improper conduct of the defendants, the dressing-case was wholly lost. It was not necessary to aver that; and I think the plaintiff was not obliged by that allegation to prove negligence. I therefore think the rule should be discharged.

V. WILLIAMS, J.—I am of the same opinion. I think the defendants are liable for the loss of the dressing-case; for, at the time of the loss, it was in the custody of the defendants as carriers. I must admit, that, before the dressing-case was lost, the transit described in the declaration had come to an end. I do not mean to give an opinion whether the defendants were obliged to do more than deliver the luggage on the platform. But I think if they oblige passengers by supplying porters to carry luggage from the carriages to the coaches, their liability continues. The only difficulty here is, to adapt the evidence to the pleadings; it cannot apply to the second and third counts, and we are therefore driven to the first. As the merits are with the plaintiff, I am disposed to adopt the

(*a*) 3 Scott N. R. 1; 8 Id. 604. (*b*) 1 T. R. 27.

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liberal view taken by my learned Brothers on the construction of the first count.

Rule absolute to enter the verdict for the defendants on the issues raised on the second and third counts, except those raised under the Carriers Act, and

Rule discharged as to the rest.

COURT OF EXCHEQUER.

Hilary Term, 1849.

Jan. 29th.

SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY *v.* ANDERSON.

To an action for calls the defendant may, under a traverse of his being a shareholder, prove that he was not such de jure as well as de facto.

THIS was a rule, obtained by *T. Jones*, calling upon the plaintiffs to shew cause why the defendant should not be allowed to plead the fourth and fifth pleas hereinafter mentioned, and which had been disallowed by *Rolfe*, B., at Chambers. The defendant proposed to plead, *first*, never indebted; *secondly*, that he was not a shareholder; *thirdly*, that no calls had been made; *fourthly*, that no meeting of the Company had been called before the shares were created; *fifthly*, that the shares were not agreed to be created at a meeting of the Company.

This was an action against an alleged shareholder for calls, and the declaration was in the statutory form. The Company originally existed as a Canal Company, called "The Company of Proprietors of the Ellesmere and Chester Canal;" but by 9 & 10 Vict. c. cccxxii, the Company was empowered to convert a portion of the canal into a railway, and their name was changed as above. By that Act, the

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Companies Clauses Consolidation Act was incorporated therewith with respect "to the powers of the Company to be exercised only in general meeting," &c., "the distribution of the capital of the Company into shares, the transfer or transmission of shares, the payment of subscriptions, and the means of enforcing the payment of calls, so far as they were applicable and not modified by that Act or inconsistent with the provisions thereof." By sect. 62 certain shares were allotted to the proprietors of the old Company; and by sect. 67 the Company were empowered "to raise by the creation of new shares (other than the shares thereinbefore authorised to be created by them), for the purposes of that Act, the sum of 1,000,000*l.* in addition to any monies which they were then authorised to raise, upon such terms and in such manner as might be or might have been agreed upon at any general meeting of the Company, specially convened for that purpose."

Bovill shewed cause.—The 27th section of the Companies Clauses Consolidation Act expressly declares what shall be the necessary proof in an action for calls, namely, that the defendant was a shareholder at the time of the call, that the call was in fact made, and that notice thereof was given; and that it shall not be necessary to prove the appointment of the directors, nor any other matter whatsoever; and, if no meeting of the Company has been properly held before the creation of the shares, then the defendant is not a shareholder, and that defence is open to him under the general issue. [He cited *The London and Brighton Railway Company* v. *Fairclough* (*a*), *Same* v. *Wilson* (*b*), *The South Eastern Railway Company* v. *Hibblewhite* (*c*).]

T. Jones, contrà.—It is at least doubtful, whether the defence raised by the fourth and fifth pleas can be given

(*a*) Ante, Vol. 1, p. 530; *S. C.*, 6 Bing. N. C. 270.

(*b*) Ante, Vol. 1, p. 530; *S. C.*, Id. 135.

(*c*) Ante, Vol. 2, p. 247; *S. C.*, 12 A. & E. 497.

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in evidence under the other pleas, and, if there be a doubt, then the Court will allow such defence to be placed upon the record. It is essential to the defendant's being liable, that the new shares should have been created in the manner prescribed by the Act, and, if illegally created, the defendant cannot be liable. [*Parke*, B.—It never was intended that a party should be liable, unless he was entitled to the profits, and, if not so entitled, he is no shareholder.] He may not be a shareholder legally, but he still may be de facto, and the legality of the creation of the shares would not be in issue under the other pleas. [*Alderson*, B.—The 28th section of the Companies Clauses Consolidation Act makes the register only primâ facie evidence of the defendant's being a shareholder; so, although a person may be on the register, yet he may show that, in reality, he is no shareholder.]

POLLOCK, C. B.—I think that my Brother *Rolfe* was right in disallowing the fourth and fifth pleas. As a general rule, if we entertain any doubt on the subject of proposed pleas, we ought to allow them to be pleaded; but, if we entertain none, we ought not, merely because some other Court may consider them good. If that principle were adopted by us, no plea could be struck out or allowed, until the House of Lords had decided on its validity. I think that the rule ought to be to permit the use of more than one count, and more than one plea, if there be any reasonable doubt that either the plaintiff in the one case, or the defendant in the other, would suffer injustice from the want of such indulgence. If, therefore, it is clear that these pleas, in substance, are but a denial that the defendant is a shareholder, then we ought not to allow them; and my present opinion is, that such is the true view of the case. If the defendant's object be to take advantage of some matter of form to defeat the plaintiffs' demand, the general Act is intended to exclude such a defence. I collect from the statute, declaring that it shall only be ne-

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cessary for the Company to prove certain things, that the legislature intended to prevent the defendant from taking objections which did not arise on those matters. The result therefore is, that, if the defence be a substantial one, the defendant will have the benefit of it under the other pleas; if the objection is merely formal, that was intended to be excluded by the Act.

PARKE, B.—I think that the subject-matter of the proposed pleas is admissible under those which have been allowed; for if the clause in the special Act has the effect of preventing any person from sharing in the profits of the Company, other than the holders of shares created at a general meeting, the fact of the shares not having been so created is admissible under a plea denying that the defendant was a shareholder. The only doubt that I had was, whether the present point was so perfectly clear, that we ought to refuse the defendant the opportunity of raising it upon the record. The rule would seem to be, that, if there be no doubt that the Judge who tries the cause will hold that the defence set up by one plea might be given in evidence under another, we ought to refuse to allow the double pleading; but if there be any doubt, then we ought to give the defendant an opportunity of putting the facts upon the record. It is true, as stated by the Lord Chief Baron, that it cannot be perfectly clear that a proposed plea is bad, until it has been so determined by the House of Lords; but we are justified in excluding it, if all the Courts have acted on the notion that it is bad: and I have no doubt that the proposed defence is admissible, either under the plea of never indebted, or that the defendant was not a shareholder. The legislature could not have contemplated the injustice of compelling a man to pay calls when they did not intend that he should receive a share in the profits of the Company.

ALDERSON, B.—I am of the same opinion. The legislature meant, by the 27th section of the 8 & 9 Vict. c. 16,

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that the party called the holder of shares should be such de jure, and entitled to participate in the profits; therefore, under a traverse of the defendant being a shareholder, he may prove that he is not such a shareholder as is entitled to profits. The 28th section shows that the primâ facie evidence of a man's being a shareholder, which arises from his being registered as such, may be rebutted by proof that in reality he is not such shareholder. I must not, however, be understood to say, that under the special Act a holder of shares, not created at a general meeting, and, in fact, not properly issued, is not a shareholder de jure, and entitled to share in the profits; but if he is not a shareholder de jure, that may be given in evidence under the traverse of his being a shareholder; no doubt if the term "holder of shares" means the holder of shares de facto, then the defendant cannot take advantage of the provisions of the special Act.

PLATT, B.—I think that the facts proposed to be alleged by the fourth and fifth pleas may be given in evidence under those already allowed. The 27th section of the Companies Clauses Consolidation Act provides that it shall be only necessary for the plaintiffs, in an action for calls to prove, that the defendant was a shareholder, that the call was made, and that due notice was given; and that it shall not be necessary to prove any other matter. Then why are we to allow a plea alleging other matters, and amongst them a plea denying that the defendant was a shareholder? Assuming that the term "shareholder" means a shareholder de facto, it is sufficient for the Company to prove that the defendant is such a shareholder; but if it means a shareholder de jure, then the defendant may give the special matter in evidence under a traverse of his being a shareholder. It appears to me, that "shareholder" means shareholder de jure, and that the defendant may, under those pleas which have been allowed, get rid of the primâ facie evidence of his being a shareholder.

Rule discharged.

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COURT OF EXCHEQUER.

Trinity Term, 1849.

JOHNSON *v.* THE MIDLAND RAILWAY COMPANY.

June 25th.

The 86th section of the Railways Clauses Consolidation Act is an enabling provision; and if a Company act as carriers, they are not bound to carry all kinds of goods from and to every station on the line; they may limit their business as carriers from and to the two termini, and to particular description of goods. But if they profess to carry goods from one station to another, they are bound to carry all goods tendered to them for that purpose, if they have sufficient conveniences.

CASE.—The declaration stated that the defendants were common carriers of goods for hire from Melton Mowbray, in the county of Leicester, to Oakham, in the county of Rutland; that the plaintiff caused to be tendered to the defendants, at their place of business for the receipt of goods for carriage in Melton Mowbray, five tons of coals, and requested the defendants to carry the coals from Melton Mowbray to Oakham; yet, although the defendants had ample and sufficient conveniences for receiving and carrying the coals, and although the plaintiff offered to pay for the carriage, and although the defendants received and carried the goods of other persons on that occasion from Melton Mowbray to Oakham, that they, not regarding their duty as common carriers, wholly neglected and refused to receive or carry the said goods of the plaintiff.

Pleas, *first*, not guilty; *second*, that the defendants were not common carriers of goods and chattels for hire from Melton Mowbray aforesaid, modo et formâ, to Oakham aforesaid; *fourthly*, that the defendants had not ample and sufficient conveniences for receiving and carrying the said goods according to the said requirements of the said plaintiff in that behalf.

The cause was tried at the Leicester Spring Assizes, 1849, before *Maule*, J., when it appeared that some years ago a canal was formed from Syston to Melton Mowbray, which was afterwards continued by another canal to Oakham. These canals were chiefly used for the transit of coal. In the year 1845 the defendants obtained an Act for

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making a branch railway from Syston to Peterborough, passing through Melton Mowbray and Oakham, and by which they were empowered to purchase the canal from Melton Mowbray to Oakham and to close it, which they did. The Company had stations at Melton Mowbray and Oakham.

The branch line being completed, the Company were in the habit of carrying coal and other goods from Syston to Peterborough, but they had never carried coal from Melton Mowbray to Oakham, though they had carried other goods. In January, 1849, the plaintiff took to the station at Melton Mowbray a quantity of coal to be conveyed to Oakham, but the Company refused to convey them, stating, as was the fact, that they had no wagons or other conveniences at Melton Mowbray for conveying them. It also appeared that the Company could not carry coals from Melton Mowbray to Oakham without giving up the passenger traffic or having a new line of rails. The present action was thereupon brought.

The jury, under his Lordship's direction, found a verdict for the plaintiff, with nominal damages, leave being given to the defendants to move to enter a nonsuit.

Humfrey having accordingly obtained a rule in Easter Term last,

Whitehurst and *Mellor* now shewed cause.—The Company, as common carriers, by virtue of the common law and the 8 & 9 Vict. c. 20, ss. 86 and 89 (*a*), are bound to carry

(*a*) Which enacts, (sect. 86), "with respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon, as follows :—

"It shall be lawful for the Company to use and employ locomotive engines or other moving power, and carriages and wagons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the spe-

coal from Melton Mowbray to Oakham. They carry goods generally, and they have no right to limit the description of goods that they will carry; besides, they profess to carry coals from the one terminus to the other, and so carry them from Melton Mowbray to Oakham. [*Parke*, B.—But, to render them liable as common carriers, must they not profess to carry coals from the particular station? *Alderson*, B.—May not the Company say that they will convey coals to Melton, and other goods thence to Oakham; and can you make them carry coals on to Oakham? No doubt, if they carry any one's coals there, you can compel them to carry yours.] It is submitted, that a common carrier cannot select what goods he will carry, and a Company is not permitted to act differently on different portions of their line: *The King* v. *The Severn and Wye Railway Company* (*a*). [*Parke*, B.—There, there was an obligation cast on the Company to keep up the railway for the benefit of the public. This subject was considered in *Parnaby* v. *The Lancaster Canal Company* (*b*). *Alderson*, B.—Where a Company gets an Act for making an entire line for the benefit of the public, they cannot stop short and make a portion only that may be most convenient to them. But what inconvenience is there in construing section 89 literally, as imposing on the Company only the ordinary liability of common carriers? *Parke*, B.—Common carriers are not bound to repair roads; consequently, the Company, as

cial Act authorised to be taken by them."

Sect. 89 enacts, that "nothing in this or the special Act contained shall extend to charge or make liable the Company further or in any other case than where, according to the laws of the realm, stage coach proprietors and common carriers would be liable, nor shall extend in any degree to deprive the Company of any protection or privilege which common carriers or stage coach proprietors may be entitled to; but, on the contrary, the Company shall at all times be entitled to the benefit of every such protection and privilege."

(*a*) 2 B. & Ald. 646.

(*b*) Ante, Vol. 1, p. 696; *S. C.*, 11 A. & E. 223.

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carriers, are not compellable to lay down a fresh line of rails, which must be done unless they give up the passenger traffic, if they carry coals; nor are they bound to supply more carts than they are in the habit of employing, because more goods than usual are tendered to them for conveyance; so that, to support your case, it must be found as a fact, that the Company had conveniences to carry the coals.] The Company fill two characters, owners of the line, and carriers on it; in the former character they are bound to maintain the line, and in the latter they are bound to convey; and if they have not the means of conveyance, that is no excuse for a refusal to convey, though it may be for a delay in conveying. But the 86th section is compulsory, and the Company is bound to carry every description of goods except those enumerated in section 105; section 89 refers only to the extent of liability as to the things carried.

Humfrey appeared in support of the rule, but was not called upon.

PARKE, B.—The question is, whether the defendants are bound to carry coals from Melton Mowbray to Oakham. If the Company are merely in the situation of carriers, at common law they are not liable, for a common carrier is only bound to carry according to his public profession. Lord *Holt*, in *Lane* v. *Cotton* (*a*), says, "Where every subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; and for that see Kelway, 50. If on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public

(*a*) 12 Mod. 484.

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good, and has thereby exposed and vested an interest of himself, in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest when his house is not full, an action will lie against him; and so against a carrier, if his horses be not loaded and he refuse to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported." Perhaps there may be some doubt now in the case of the smith. In a learned note to *Parsons* v. *Gingell* (*a*), my Brother *Manning* intimates that the authorities do not support that proposition. However, in the case of an innkeeper, it is clear, that an action will lie. Now, there is no doubt that a carrier is bound to carry according to the profession which he has made to the public; but he may take upon himself the business of a carrier, and profess to carry light goods only, and then he cannot be compelled to carry heavy goods; or he may say that he will carry from Manchester to London, and not from the intermediate stations, and then he cannot be made to carry goods from those places; but as soon as he has publicly professed to carry in any particular manner, and so long as he does so (for he may retract and withdraw from the business if he chooses), he is bound to carry the goods of any one, if he has room in his conveyance and the price of the carriage be tendered when the goods are offered. Here, however, there has been no public profession on the part of the Company, that they will carry coals from Melton Mowbray to Oakham. Nor, indeed, would the action lie in this case even if there were such an implied contract with the public, because it does not appear that the Company had conveniences for carrying coals from Melton Mowbray to Oakham. As to the proposition, that the liability arises from the statutes under which the defendants are empowered to act, and that, when they have

(*a*) 2 C. B. 555.

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once become carriers, they are bound to carry all kinds of goods from and to every station on the line, it appears to me that that proposition is not made out. There might have been great ground for that proposition if the Acts had contained a prohibition to all other persons carrying on a like business on the line. But on the contrary, the Acts shew that the public have a right to carry goods on the railway if they please. Practically, no doubt, that right has been found to be useless. We must, however, look, not to practical effect, but to the meaning of the legislature; and I am of opinion, that, under this Act, if the Company become carriers, there is no obligation on them to take upon themselves the duties of carriers altogether and on every part of their line, but they may confine their carrying to any part to which they choose to limit themselves, and they may afterwards relinquish the business if they please, though it is not necessary to determine that point now. I am of opinion that the 86th section enables, but does not compel, the Company to act as carriers.

ALDERSON, B.—Section 86 appears to me to be clearly permissive. Mr. *Whitehurst* admits that it is so to a certain extent: that it does not compel the Company to become carriers; but he contends, that, if they have once become carriers, it then imposes on them the obligation of carrying all goods from every part of their line to every other part. But this construction is inconsistent with sect. 89, which says "that the Company shall be liable only as common carriers." Reading, therefore, the two sections together, it is clear that sect. 86 is only an enabling provision. There is no ground for saying that the defendants are liable as carriers, except at common law.

ROLFE, B.—The argument for the plaintiff might with propriety have been addressed to the legislature, for the real grievance is the shutting up the canal. It is clear,

that, if the defendants are common carriers with only the same liabilities, this action cannot be maintained.

PLATT, B., concurred.

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Rule absolute to enter a nonsuit.

COURT OF EXCHEQUER.

Hilary Term, 1849.

BURNSIDE *v.* DAYRELL. *Jan. 20th.*

An allottee of shares in a projected Railway Company paid his deposit into the bank named in the prospectus, in which the defendant's name appeared as one of the provisional committee, and as chairman of the committee of management. The defendant had not taken any part in the management of the concern, but on one occasion had acted as chairman of a meeting, when he had dissented from the proceedings. In an action against the defendant for a return of the deposit, the scheme having been abandoned:—*Held*, that the defendant was not liable. Letters written by the secretary of a Company, in answer to letters addressed to him in his character of secretary, are not evidence against the directors of the Company—*Semble*, though the prospectus refer to him for further information.

ASSUMPSIT for money had and received, interest, and upon an account stated.—Plea, non assumpsit.

The cause was tried at the London Sittings after Trinity Term, 1847, before the Lord Chief Baron, when it appeared, that, in October, 1845, the promoters of an undertaking issued the following prospectus:—

"The Direct Manchester, Leeds, and York Railway Company, provisionally registered, &c. Capital, 800,000*l.*, in 40,000 Shares of 20*l.* each. Deposit, 2*l.* 2*s.* per share."

Amongst the names of the provisional committee, the defendant's name appeared as one of them, and as the chairman of the committee of management.

On the 14th of October, 1845, the plaintiff applied for 200 shares in the Company; and on the 10th of November he received a letter of allotment for twenty shares, deposit 42*l.*, which was signed by J. Whitehead, the secretary of the Company; and the plaintiff, on that day, paid the amount of his deposit into the bank named in the prospectus. The scheme, having proved abortive, was abandoned, and this

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action was thereupon brought, to recover back that deposit. The defendant, it appeared, had taken no active part in the proceedings of the Company, and had only been present at one of the meetings of the committee, on the 3rd of November, 1845, when he acted as chairman. He then dissented from the proceedings.

At the trial, two letters sent in February, 1846, and addressed by the secretary, Whitehead, to the plaintiff, in answer to letters addressed to him by the plaintiff, were tendered in evidence by the plaintiff, which were objected to and rejected, on the ground that there was no evidence of any authority in Whitehead to write the letters.

The learned Judge left two questions to the jury:—*First*, whether the defendant's name was held out as chairman of the Company with his knowledge and consent; and, *secondly*, whether he personally superintended the allotment of shares to the plaintiff. The jury found the first question in the affirmative, and the second in the negative.

A verdict was thereupon entered for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit, if the Court should be of opinion, that, under the circumstances, the defendant was not liable.

A rule nisi having been accordingly obtained in Michaelmas Term, 1847, by *Crowder*, on behalf of the defendant; and *Martin* having, on behalf of the plaintiff, obtained a rule for a new trial, in the event of the other rule being made absolute, on the ground that the letters of the secretary had been improperly rejected—

May 27th. *Martin* and *Addison* (with whom was *Montague Chambers*) now shewed cause against the first-mentioned rule (*a*). —This case is not distinguishable from *Walstab* v. *Spottiswoode* (*b*). The defendant's name appeared, with his authority, in the prospectus, and the plaintiff subscribed to-

(*a*) Before *Pollock*, C. B., *Rolfe*, B., and *Platt*, B.

(*b*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.

wards the undertaking and paid his deposit, on the faith of that representation; he is, therefore, entitled to recover against the defendant. The fact that the defendant did not personally interfere in making the allotments, does not affect the case. [They cited *Reynell* v. *Lewis* (*a*), *Wyld* v. *Hopkins* (*b*), and *Nockells* v. *Crosby* (*c*).]

Crowder, *Hoggins*, and *Bovill*, contrà.—It is now settled, that the mere circumstance of a person allowing his name to be inserted in a prospectus as a director, does not render him liable to the creditors of the Company, nor does the fact of the defendant's having attended once at the meeting of the committee affect his liability, as he altogether dissented from the proceedings. The allotment was not made by the defendant, nor were the deposits paid to him or his agents.

Cur. adv. vult.

POLLOCK, C. B.—This was an action brought to recover back a deposit from the defendant, as one of the provisional committee of the Direct Manchester, Leeds, and York Railway Company. The action was for money had and received, to which the defendant pleaded non assumpsit. The defendant must be taken to have concurred in circulating a prospectus, in which his name appears as one of the provisional committee, and chairman of the committee of management. The date on which the prospectus was proved to have been circulated was the 13th of October, 1845. The form of the application for shares was given in the prospectus, and it does not differ from the usual form which is found in similar instruments. Pursuant to the prospectus, the plaintiff, on some day in October, 1845, applied to the provisional committee for shares; and, on the 11th of November, he paid, by way of deposit, the amount of his

(*a*) Ante, Vol. 4, p. 351; *S. C.*, 15 M. & W. 517.
(*b*) Ibid. (*c*) 3 B. & C. 814.

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deposit for shares into a country bank, by which it was remitted to the Commercial Bank (being the bank named in the prospectus). The project failed, and the question is, whether the plaintiff can recover back his deposit from the defendant. It may be assumed that there was such an entire failure of consideration as entitled the plaintiff to recover back his deposit from some one; and the only question is, whether the defendant is one of the parties liable to refund that deposit. We think that he is not. He can only be liable because he was the person, or one of the persons, to whom the deposit was paid. There was no evidence that such was the case in the present instance. The defendant never acted at all, except by once attending a meeting, as chairman, on the 3rd of November, and by concurring in the circulation of the prospectus; the attendance on the 3rd of November has nothing to do with this part of the case. The prospectus only points out the course to be pursued by the parties desirous of getting shares; namely, by application to the provisional committee. If, acting on this, the plaintiff applied to A., B., and C., three members of the provisional committee, and deposited the money with them, this might bind the defendant to permit the plaintiff to be a member of the Company when formed, but it does not make the defendant liable for money not paid to him, when the project has failed. The plaintiff must recover back his money from the parties to whom it was paid. Although the money was paid to the bankers named in the prospectus, it was not paid to the use of the defendant, nor was there any proof that the defendant ever received, or could have received any part of it. There was no evidence that he was one of the persons in whose names the account was opened with the bank where the money was kept; and I must again observe, that the only occasion on which he ever attended any meeting of any sort was on the 3rd of November, when he went for the purpose, not of concurring in the business of the meeting, but of making some com-

plaints, which he did, and of objecting to the whole course of proceeding,—the evidence being that he quarrelled with the people there, and that he went away, and never was present at any other meeting whatsoever. There is no difference, as far as the defendant is concerned, between the case of money received by other members of the provisional committee, and goods furnished by the order of other members of the committee. The parties paying the money must look to those to whom they paid it, as tradesmen furnishing goods must look to the parties by whom they were ordered, or if credit was given, they must prove that it was with the sanction of those whom they seek to charge. *Walstab* v. *Spottiswoode* is distinguishable from this case; there, the secretary was the agent designated by the defendant as the person to whom application for shares should be made, and the money paid to him was therefore paid to the defendant himself. The case there proceeded on that assumption, the argument turning, not on the point, whether the defendant was one of the parties to whose hands the deposit had come, but, admitting that to be the fact, whether it could be recovered back in an action for money had and received. I may observe, that in *Walstab* v. *Spottiswoode* it was distinctly made out that the defendant was an active person in the management of the concern, frequently attending from first to last. The defendant in the present case never attended but once, on the 3rd of November; and, as I have observed, he went there not for the purpose of concurring in the business, but of objecting to it, and went away and never came again. Here there is nothing to shew that the defendant received any part of the deposit, or that he ever concurred in any matter of contract made with the plaintiff, or was any party to it, or sanctioned it. The rule, therefore, for a nonsuit must be made absolute.

Crowder now shewed cause against the second rule.—

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The letters of Whitehead were properly rejected. A secretary has no authority, as such, to bind his principals, and there was nothing from which either an express or implied authority could be inferred.

Martin, *Montague Chambers*, and *Addison*, in support of the rule.—The letters, being answers to others addressed to the secretary by the plaintiff, were admissible, as being part of the same transaction. It is the duty of the secretary to carry on the correspondence of the Company; he is delegated for that purpose; and any answers from him are admissible against his principals: Chitty on Contracts, 216; *Pickering* v. *Busk* (*a*). [*Pollock*, C. B.—It was part of the secretary's duty to submit all letters to the committee. Are we to assume that he has submitted these letters?] It must be assumed that he had done his duty. Besides, the prospectus declares "that application for shares is to be made, and further particulars had, at the Secretary's, 11, Finsbury Square;" and therefore, his answer to letters directed there is admissible in evidence. [They also cited *Nickson* v. *Brohan* (*b*), and *Blandy* v. *De Burgh* (*c*).]

POLLOCK, C. B.—The only question in this case is, whether the letter alluded to, written by the secretary Whitehead in answer to one of the plaintiff, of February, 1846, was or was not receivable in evidence. I think not. I retain entirely the same opinion as that expressed by me at the trial. If this were evidence, then any verbal answer from the secretary would be so also. A secretary means a person confidentially employed,—a person supposed to be conversant with the secrets of his master. In actions to recover back deposits, it has never been contended that it would be sufficient to show that the depositor went to the office, and

(*a*) 15 East, 38.
(*b*) 10 Mod. 110.
(*c*) Ante, Vol 5, p. 361; *S. C.*, 6 C. B. 623.

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that the secretary answered that the deposits were to be returned. This Court has declared, that the ordinary rules of partnerships do not apply to corporations of this description, and that, in actions against an individual director, you must shew that he has concurred, either expressly or impliedly, in the particular resolution or act relied on. If the acts of a provisional committee do not bind a particular member of it, unless you connect him with it, by showing that he was a party to the communication, à multo fortiori the acts of the secretary would not bind him, which might be founded on some particular resolution. If the secretary had been called, and had said that he wrote this letter from the instructions of the committee, that Mr. Dayrell was not there, but that he afterwards protested against writing the letter; it might as well be said that he would be bound in that case. How can he be bound, unless there be a rule of law that the majority have a right to bind the minority? The resolutions of a board do not bind the whole of the directors, but only bind those that are present at the board, actually or impliedly concurring in the resolution. It appears to me, that the answer of the secretary is not evidence, unless it be shewn that he had authority; and that it cannot be implied that he had authority from the fact of his being secretary. The concern was at an end when the application was made, and in fact he was functus officio. It would be a strong thing to say, that, if the concern were bankrupt, the acts of the secretary would bind it, when, perhaps, they were winding up the concern. I think that the answer would not bind the board, and could not, therefore, bind Mr. Dayrell, or be evidence against him.

ROLFE, B.—I am of the same opinion. This is evidence of a third party against Mr. Dayrell, and therefore it is only evidence against him on the ground of some express or implied authority; and it is said that the secretary has

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given to him some implied authority, by the fact of his being appointed secretary to the Company. But when it has been decided that the acts of a committee, such as these, do not bind those members who are not present, then it follows à multo fortiori, that the acts of the agent of the committee would not be evidence against an absent member. I doubt very much whether this letter can be taken to have been written within the scope of the secretary's authority; and I also doubt whether, if it can, it could have been given in evidence at all.

PLATT, B.—I quite concur with the rest of the Court. If what is contained in the letter was given in evidence by word of mouth, it is clear that it would not alone bind a member of the board; and, if that be so, why should this written document? It is clear that there was no proof of an express authority; then, was there a general authority? What evidence is there of a general authority? Only that he was secretary. Now, the word "secretary" means a variety of different capacities; he may be one employed to write correspondence, or to compose; and there is nothing in being secretary to give him a general authority. I was at first struck by the argument of Mr. *Addison* with reference to the prospectus. If it had referred generally to the secretary, perhaps there might have been some evidence of a general authority; but when we look at the prospectus, it is quite clear it refers to a number of different individuals for information respecting the scheme. If this prospectus were to confer a general authority to the persons referred to, then all the persons referred to, amounting to twenty or thirty, would have such general authority,—a construction too outrageous to be entertained. As to what my Lord has said, that, if Dayrell had been present at a meeting of the directors, and had dissented from a resolution, he would not be bound by it, I do not feel disposed to bind myself by that proposition. The result is, that this is a question of au-

thority, and it appears to me that there was no evidence either of an express or general authority. The rule must therefore be discharged.

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Rule discharged.

COURT OF EXCHEQUER.

Michaelmas Term, 1848.

1848.
Dec. 8th.

HIGGINS *v.* HOPKINS.

ASSUMPSIT for work and labour in valuing lands, &c., money paid, and for money due upon an account stated. —Plea, non assumpsit.

In an action by a surveyor against one of the managing committee of a Railway Company, for surveying the line, it appeared that the plaintiff was employed by one of the committee, and which appointment was ratified by a resolution of the committee, at which the defendant presided,—the learned Judge directed the jury to consider whether the defendant could have meant to pledge his own personal credit, or merely the credit of the funds of the Company:—*Held*, that the direction was right.

If the contract was, that the defendant should pay if he had funds of the Company, and he had received them, then the conditional contract would have become absolute, and the defendant would have become liable in indebitatus assumpsit.

The cause was tried before *Wilde*, C. J., at the Spring Assizes, 1848, for the county of Warwick, when it appeared that the action was brought by the plaintiff, a surveyor, to recover the sum of 2584*l.* 15*s.* for the valuation of property on the line of a projected railway, the Warwick, Rugby, and Worcester Railway. The defendant was an active member of the managing committee of the Company. The prospectuses of the Company were issued, and deposits were received, to the amount of between 22,000*l.* and 23,000*l.*

At one of the meetings of the committee, the defendant being present, it was resolved that one Saunders should be employed to make a valuation of the lands, &c., on the intended line. Saunders being unwilling to undertake the valuation, one Grant, a member of the committee, applied to the plaintiff; and at a subsequent meeting of the committee, at which the defendant was, the plaintiff was, with the approbation of all the members present, substituted for Saunders. Grant communicated to the plaintiff

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his appointment, and he made the valuation, and sent in his report. Subsequently, at a meeting of the committee, at which the defendant acted as chairman, it was resolved that the settlement of the plaintiff's account should be left to Grant and a Mr. Shaw.

In summing up the case to the jury, the learned Judge told them that the question was, whether the plaintiff and defendant meant to contract on the footing of a personal liability of the defendant, either alone, or as a member of the acting committee, or on the credit of the funds; and if on the credit of the funds, that the defendant was not liable in the present form of action; but that the plaintiff ought to have declared specially for a misapplication of the funds. A verdict was found for the defendant.

In Easter Term, *Humfrey* obtained a rule for a new trial, for misdirection, and also on the ground that the verdict was against evidence. With respect to the first point, he contended that the learned Judge had misdirected the jury in telling them that the question was, whether the defendant meant to contract on his own personal responsibility,—that the real question was, whether the defendant had induced the plaintiff to contract, on the footing of his being personally responsible; that the learned Judge was also wrong in telling the jury, that if the plaintiff contracted on the credit of the funds, he should have declared specially.

Whitehurst now (*a*) appeared to shew cause against the rule, and *Humfrey* to support the rule, when it was admitted that the summing up of the learned Judge was to the above effect. The arguments are omitted, as the effect of them is contained in the judgment.

Cur. adv. vult.

(*a*) Cor. *Parke*, B., *Rolfe*, B., and *Platt*, B.

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PARKE, B.—This case was tried before my Lord Chief Justice *Wilde*, at the Spring Assizes for the county of Warwick. It was an action brought by the plaintiff, a surveyor, to recover a large sum from the defendant for valuations, the defendant being one of the acting committee of an intended Railway Company, and a very constant attendant at its meetings. Prospectuses were issued, and subscriptions made for shares, and deposits received, amounting to 22,000*l.* or 23,000*l.* There was a written resolution of the committee, that one Saunders should be employed to make a valuation. The defendant objected at that meeting, but ultimately acquiesced in the resolution. Saunders would not act, and one Grant, another member of the committee, then applied to the plaintiff to take Saunders' place; and, at a subsequent meeting, the defendant assented to that appointment, and the fact of such appointment was communicated by Grant to the plaintiff, who acted upon it, and made and sent in his surveys. The defendant afterwards was a party to an agreement to refer the plaintiff's bill to Grant and another person of the name of Shaw, for settlement. The Lord Chief Justice left the case to the jury, who found a verdict for the defendant; and a rule nisi was obtained for a new trial, on the ground that the case was not properly presented to the jury. The imputed misdirection was, that my Lord Chief Justice had told the jury that the question was, whether the defendant could have meant to pledge his own personal credit to the plaintiff by employing him, which, it was said, was immaterial, provided the defendant induced the plaintiff to contract with him on the footing of his being personally responsible. In the statement of the summing up, the counsel on both sides agreed, and from that statement the Lord Chief Justice appears to have left the question to the jury with perfect correctness in that respect; and the summing up was not open to that objection; but it was said that the Lord Chief Justice left it to the jury, whether the plaintiff and

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the defendant meant to contract on the footing of the personal liability of the defendant, either alone or as a member of the acting committee, or on the credit of the fund; and that there was no evidence which would warrant the jury in finding that the plaintiff looked to be paid out of the funds only; that the employment of the plaintiff primâ facie meant that he was to contract on the personal credit of the employer; and that it lay on the defendant to shew that the plaintiff was informed, or ought to have concluded, that he was not, but was to rely for payment on the monies collected by the committee. Whether any contract is made, or on what terms it is made, must depend on the circumstances of each case. If a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand or not, there is no contract. If he does work on the orders of another, under such circumstances as that, it must be presumed that he looks to be paid, as a matter of right, by him; then a contract would be implied with that person, —under most circumstances an absolute one, under some a conditional one, provided he receives funds to pay. This matter was a good deal examined in *Thomas* v. *Edwards* (*a*), which was an action by an innkeeper for furnishing entertainment to voters. We think there was evidence proper to be laid before the jury under each of those heads; and the law in that respect appears to have been properly laid down. But it is further suggested, that the Lord Chief Justice told the jury, that, if the plaintiff looked to the funds for payment, the defendant would not be liable in this action, although he might in a special action, for not properly applying the funds; and it is contended that this was incorrect, because, if the defendant had received the funds, the conditional contract made by him, to pay when he received them, became absolute, and might be declared

(*a*) 2 M. & W. 215.

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upon, as every contract executed resulting in a debt payable instanter may, in indebitatus assumpsit. In the part of the summing up to which we have referred, we doubt whether my Lord Chief Justice meant to say that no action of indebitatus assumpsit for work and labour would lie in such a case. If there was such a contract with the defendant, or with him and others, that he or they should pay, if they had funds applicable to this demand, and they had received them, the conditional contract would have become absolute, and this action might be maintained. We think the jury may have been misled by this part of the summing up; and therefore we think that it would be more satisfactory if the case went down to a new trial, that this view of the case may be more fully presented to them. We think that the costs of the last trial ought, under the circumstances of this case, to abide the event.

Rule absolute.

COURT OF QUEEN'S BENCH.

Michaelmas Term, 1849.

SAYLES *v.* BLANE.

1849.
Nov. 6th.

The transferree of shares who neglects to procure the deed of transfer to be registered, is not liable in an action *for money paid*, for the amount of calls made subsequently to the transfer, and which the plaintiff, the transferror, being the registered owner, has been compelled to pay.

ASSUMPSIT.—The first count was for not procuring the transfer of shares made by the plaintiff to the defendant, to be registered; and the second count was for money paid. Plea, the general issue.

The cause was tried at the York Summer Assizes, 1849, before *Patteson*, J., when it appeared that the plaintiff, being the registered owner of shares in the Manches-

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ter and Lincolnshire Railway Company, on the 6th of January, through his broker, sold some of his shares, and the defendant, on the day previously, through his broker, purchased twenty shares in the same Company; but the respective brokers were not brought together by the evidence; and it was apparent that the defendant did not purchase of the plaintiff, but that third persons intervened between them. Subsequently, the plaintiff was called upon to transfer his shares to the defendant, which he accordingly did by a regular deed of transfer; but this deed was not registered, and the plaintiff remained the registered owner up to the time of the trial; and being such, he was called upon by the Company to pay, and did pay, after notice to the defendant to pay, four calls, which were made subsequently to the transfer. The action was brought to recover the amount of these calls.

It was admitted at the trial, that the special count was not proved; but it was contended, that the plaintiff was entitled to recover under the count for money paid. The learned Judge was of opinion that he could not, and directed a nonsuit, giving the plaintiff leave to move to set aside the nonsuit, and to enter a verdict for the plaintiff for 264*l.* 11*s.* 3*d.*

Martin now moved.—The defendant was bound to pay the calls due subsequently to the transfer, according to the established usage, and the case of *Wynne* v. *Price*(*a*); and as the plaintiff, under the 15th section of the Companies Clauses Consolidation Act, continued liable, until the transfer had been registered, to pay the calls, and did by compulsion pay them for the defendant's benefit, the money so paid, was paid to the defendant's use: *Brittain* v. *Lloyd* (*b*), *Spencer* v. *Parry* (*c*), *Bayley* v. *Wilkins* (*d*). The

(*a*) Ante, Vol. 5, p. 465.
(*b*) 14 M. & W. 762.
(*c*) 3 A. & E. 331.
(*d*) 18 L. J., C. P., 273.

case of *Humble* v. *Langston* (a) would at first sight appear to be opposed to this view; but the transfer in that case was not perfect, the name of the transferree being left in blank. [He also cited *Bailey* v. *Bracebridge* (b) and *Burnett* v. *Lynch* (c).]

Cur. adv. vult.

COLERIDGE, J.—The special count in this case not having been proved, the question is, whether the plaintiff was entitled to recover upon the count for money paid. The plaintiff was the registered owner of certain railway shares. The defendant, through his broker, purchased a number of shares in the same Company on the 5th of January. The plaintiff, the day after, through his broker, sold his shares; but the respective brokers were not brought together by the evidence, and, indeed, it is apparent by the dates, that the defendant did not purchase of the plaintiff, and that third persons intervened between them. The plaintiff, however, as the registered owner, subsequently transferred to the defendant by a deed regularly executed. It was then the duty of the defendant to have procured that deed to be registered, which appears as well by the custom and usual course of dealing, as by the decision of the Vice-Chancellor *Knight Bruce*, in *Wynne* v. *Price*, cited on moving for the rule. [His Lordship referred to the other evidence, and proceeded.] The stat. 8 & 9 Vict. c. 16, s. 16, provides, that until the tranfer deed is registered, the transferror shall be liable for the calls, and shall receive all the profits, and that the transferree shall not be entitled to any profits, or to vote in the affairs of the Company.

Now, the count for money paid proceeds on one of two suppositions,—either that the plaintiff has paid the money

(a) Ante, Vol. 2, p. 533; *S. C.*, 7 M. & W. 517.
(b) 19 L. J. (N. S.), Q. B., 73. (c) 5 B. & C. 589.

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for the defendant at his request, or that he has been compelled to pay money for which the defendant was liable to the person receiving it, as in the case of a surety paying the debt of his principal, and similar cases. Here there is no ground for saying that the defendant directly or indirectly requested the plaintiff to pay the money; neither is there any ground for saying that the defendant was liable to any one for the money paid by the plaintiff, so as to create the relationship of principal and surety, or any other relationship of a like kind. The statute plainly continues the liability of the plaintiff, and gives him the interest in and profits of the concern until the transfer is registered, treating the defendant as an entire stranger to the Company; and the payment of the calls by the plaintiff did not in any way alter his (the defendant's) position. At most, there was a failure in the performance of a duty on the part of the defendant, in not getting the transfer deed registered, which the plaintiff might have called upon him to perform, although he does not appear to have done so. We think, therefore, that the principle on which the case of *Humble* v. *Langston* was decided, applies to this case, and that it is impossible to treat this as a case of money paid to the use of the defendant.

Rule refused.

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COURT OF EXCHEQUER.

Easter Term, 1849.

COPE *v.* THE THAMES HAVEN DOCK AND RAILWAY COMPANY. *May 12th.*

ASSUMPSIT for work and labour, money paid, and on an account stated. Plea, non assumpsit.

The cause was tried at the Liverpool Summer Assizes, 1848, before *Erle*, J., when the plaintiff had a verdict, leave being reserved to the defendants to move to enter a verdict for them. The Company were established in 1836, and incorporated by the 6 & 7 Will. 4, c. cviii, for making a railway from or near Romford to Shell Haven, in Essex; and in 1846, the plaintiff, being much experienced in effecting amalgamations of lines, was employed to negotiate with the London and North Western Railway Company, or any other Company, for leasing the line. The resolution appointing the plaintiff for that purpose was come to at a meeting of the directors, held on the 19th of November, 1846, and was entered in the minute-book, signed by the chairman, read over to and assented to by the plaintiff, and was as follows:—"Resolved, that Mr. C. H. Cope, of Manchester, be appointed joint agent with Mr. Geary, for the Thames Haven Dock and Railway Company, and that they be authorised to negotiate with the London and North Western Railway Company, or any other Railway Company, for the lease of the line; and that their acts as such agents be recognised, subject to the confirmation of the

The directors of a Railway Company incorporated by Act of Parliament were empowerd thereby to use the common seal on behalf of the Company; and it was enacted (sect. 119), that all contracts relating to the affairs of the Company, which should be signed by any three of the directors, in pursuance of a resolution of a court of directors, should be binding on the Company. The 120th section empowered the directors to employ workmen and to regulate the traffic on the line, and the rates and tolls, and appoint and displace the bankers and solicitors of the Company, and all such managers, officers, agents, clerks, workmen, and servants, as they should think proper. By a resolution of the court of directors, signed by the chairman, the plaintiff was employed as agent of the Company, to negotiate with another Company for the lease of the line:—*Held, first*, that the plaintiff was not an agent within the 120th section; and, *secondly*, that as the resolution was not under the corporate seal, or signed by three of the directors, the Company were not liable for services rendered under that resolution.

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directors and shareholders of this Company. Resolved, that the secretary be ordered to forward a copy of the above resolution to Mr. C. H. Cope."

Sect. 119 of the private Act enacts, "that the court of directors for the time being shall have full power and authority to use the common seal on behalf of the said Company; and all contracts in writing relating to the affairs of the said Company which shall be signed by any three of the directors, in pursuance of a resolution of a court of directors, shall be binding on the said Company, and all other parties thereto, their respective successors, heirs, executors, and administrators; and actions and suits may be maintained thereon, and damages and costs recovered by or against the said Company, or any other parties thereto failing in the execution thereof."

The 120th section enacts, "that the said directors shall have full power and authority to employ the works and workmen, and regulate the traffic upon the said railway, and the amount of rates, tolls, &c. to be taken; and also from time to time to appoint and displace the bankers and solicitors of the said Company, and all such managers, officers, agents, clerks, workmen, and servants, as the directors shall think proper," &c.

It was contended, at the trial, that, as there was no contract under the seal of the Company, or signed by three of the directors, pursuant to the 119th section, the defendants were not liable. The learned Judge directed a verdict for the plaintiff, giving the defendants leave to move.

In Michaelmas Term last, *Martin* obtained a rule, according to the leave reserved, citing *Beverley* v. *The Lincoln Gas Light Company* (*a*), *Arnold* v. *Mayor of Poole* (*b*), and *The Mayor of Ludlow* v. *Charlton* (*c*).

(*a*) 6 A. & E. 829. (*b*) 4 M. & G. 862. (*c*) 6 M. & W. 815.

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Knowles and *Atherton* now shewed cause (*a*).—The plaintiff was employed as a servant of the Company, and it was not necessary that he should have been appointed under seal, or by writing signed by three of the directors, pursuant to the 119th section. That section must be taken in conjunction with the 120th, which empowers the directors to appoint agents in their discretion. [*Parke*, B.—The plaintiff is not one of the agents contemplated by that section, which means ticket-takers, superintendents, and others of that description; and if not an agent within that section, must he not be appointed under seal? His employment is out of the ordinary course; and if no seal be necessary, then it would seem to follow that the directors might make any contract without seal.] It is submitted, that the plaintiff is an agent within the 120th section.

Martin and *Aspland* appeared in support of the rule, but were not called upon.

PARKE, B.—This rule must be made absolute. The contract in question can be binding only by virtue of its having been made under seal, or having been signed by three directors, neither of which requisites have been complied with. The law is perfectly well settled by the cases of *The Mayor &c. of Ludlow* v. *Charlton* (*b*) and *Cox* v. *The Midland Counties Railway Company* (*c*), and was very well explained by my Brother *Rolfe*, in the former case, where he refers to the common notions on the subject of a corporate seal. Exceptions to this rule were formerly introduced, when it was held, that a seal need not be used in matters of frequent or ordinary occurrence, as in the hiring of servants or other small acts; but these cases are not to be extended, as we intimated in *Cox* v. *The Midland Railway Company*. In

(*a*) Before *Parke*, B., *Rolfe*, B., and *Platt*, B.

(*b*) 6 M. & W. 815. (*c*) Ante, Vol. 5, p. 583; *S. C.*, 3 Exch. 268.

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the present case, however, it appears clearly the intention of the legislature, that acts similar to the present should be effected by means of the corporate seal. Can we, then, collect that the intention of the legislature was, that this contract was one that could be made without a formal instrument? I think not. It is not within the 120th section. Even admitting that parties, under certain circumstances like the present, may have a remedy against the directors, of which my Brother *Rolfe* has doubts, I agree with him in thinking it doubtful whether there is any remedy against the Company. It seems to me, that the 120th section extends to agents, in the ordinary course of their employment. The Company may be bound by any agreement to make a slight alteration in some of their works, or to employ ordinary servants, although that agreement be not under the corporate seal; but they cannot so bind themselves by a contract of this description. There may, perhaps, be a difference between the case of corporations created by charter, and those created by Act of Parliament. The decisions are confined to cases of parliamentary corporations.

ROLFE, B.—My opinion is, that the case is not within the 120th section. I do not think that the present action is authorised at all; but I do not wish to be bound by that opinion, without further consideration of the Act of Parliament.

PLATT, B., concurred.

Rule absolute.

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COURT OF QUEEN'S BENCH.

Sittings after Hilary Term, 1849.

SHAW *v.* THE YORK AND NORTH MIDLAND RAILWAY COMPANY.

Feb. 24th.

CASE.—The declaration stated, that the defendants were proprietors of a certain railway, to wit, the York and North Midland Railway, and of certain carriages used by them for the carriage and conveyance therein and thereon of passengers, cattle, and goods and chattels, in, upon, and along the said railway and other railways, for hire and reward to them the defendants in that behalf; and that the plaintiff, before the committing of the grievance hereinafter mentioned, and before the commencement of the suit, to wit, on &c., at the request of the defendants, caused to be delivered to the defendants, and the defendants thereupon then received from the plaintiff, divers, to wit, nine horses of the plaintiff, to be safely and securely carried by the defendants in and upon the carriages of the defendants, on and by the said railway, to wit, from York to Watford, in the county of Hertford; that is to say, from the York terminus of the said York and North Midland Railway, to a certain railway station or stopping place, called the Watford Station, being a station of and upon a certain other railway, and to be safely and securely delivered to the plaintiff at Watford aforesaid, to wit, at the

In an action on the case, the declaration stated, that the defendants were proprietors of a railway and carriages for the conveyance of passengers, cattle, &c., for hire; that they received nine horses of the plaintiff's, to be safely carried, and it was their duty safely to carry and deliver the said horses: the declaration then averred the loss of one of the horses by reason of the insufficiency of the carriage in which it was being conveyed.

The ticket for the carriage of the horses given by the defendants to the plaintiff contained a memorandum, to the effect that the defendants would not be liable for any injury occurring to the horses whilst travelling, or loading or unloading:—*Held*, that the terms contained in the ticket formed part of the contract for the conveyance of the horses, and that the allegation of the defendants' having received the horses, "to be safely and securely carried," was not supported by the evidence.

Semble, that, notwithstanding the terms of the contract, the plaintiff might have alleged a breach of duty in the defendants' not providing a sufficient carriage.

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said railway station called the Watford Station, for certain reasonable reward to the defendants in that behalf; and the defendants having so received the said horses as aforesaid, for the purpose aforesaid, it thereupon became and was the duty of the defendants safely and securely to carry, and convey and deliver the said horses of the plaintiff as aforesaid; yet the defendants, not regarding their duty in that behalf, did not nor would use due and proper care in and about the carriage and conveyance as aforesaid of the plaintiff's said horses from York aforesaid to Watford aforesaid, but then, to wit, on the day and year aforesaid, took so little and such bad care in this behalf, and so wrongfully, improperly, and negligently conducted themselves in and about the carrying and conveying of the said horses of the plaintiff, that, by reason and in consequence of the then insufficiency and defective state and condition of a carriage of the defendants, wherein one of the said horses, of great value, to wit, &c., was then being carried and conveyed by the defendants, on the occasion aforesaid, the said last-mentioned horse, whilst being carried and conveyed therein by the defendants, on the occasion aforesaid, was then killed; and the said last-mentioned horse, being of the value aforesaid, thereby became and was wholly lost to the plaintiff.

Pleas.—*First*, not guilty. *Secondly*, that the defendants did not receive from the plaintiff the said horses in the declaration mentioned, or any of them, to be safely and securely carried by the defendants in and upon the carriages of the defendants on and by the said railway, in the said declaration in that behalf mentioned, to wit, from York to Watford, &c., to be safely and securely delivered to the plaintiff at Watford aforesaid, modo et formâ. *Thirdly*, that the defendants received from the plaintiff the said horses in the declaration mentioned, to be carried by the defendants from York to Watford, subject to a certain

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contract between the plaintiff and the defendants then in that behalf made, namely, that the plaintiff should undertake all risk of conveyance of the said horses whatsoever, and that the defendants should not be responsible for any injury or damage, however caused, occurring to the said horses while travelling on the said railway, or in loading or unloading the same; and that the said horse in the said declaration in that behalf mentioned was killed, and the said loss and damage to the plaintiff occurred, whilst the said horse was travelling in and upon and along the said railway in the said declaration mentioned, called the York and North Midland Railway.—Verification. *Fourthly*, that the said horse was killed whilst being carried and conveyed as in the said declaration in that behalf mentioned, by reason of the negligence and unskilfulness of the plaintiff.—Verification.

The plaintiff took issue on the first, second, and last pleas; and to the third replied, that the defendants received from the plaintiff the said horses, to be carried as in the said declaration in that behalf mentioned, without any such contract as in the said third plea mentioned being in that behalf then made between the plaintiff and the defendants modo et formâ, &c.; and concluded to the country.

On the trial, before *Alderson*, B., at the Yorkshire Spring Assizes, 1848, it appeared that the plaintiff had nine young horses to be conveyed by railway from York; that he went to the station there, and was shown three horse-boxes. In one a screw was loose, and the partition between the stalls was consequently insecure. To this horse-box the plaintiff objected; whereupon one of the servants of the defendants made an ineffectual attempt to remedy the defect, and assured the plaintiff that the box was quite safe. The horses were put into the boxes, and the plaintiff and his servant travelled by the same train, and from time to time attended to them. The plaintiff received at

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the booking-office, where he paid 12*l.* 1*s.*, the carriage of the horses, a ticket containing the following memorandum: —"N. B.—This ticket is issued subject to the owner's undertaking all risk of conveyance whatsoever, as the Company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, or in loading or unloading." During the journey, it was discovered that one of the plaintiff's horses was dead, his death having resulted from the defective partition becoming loose. The counsel for the defendants contended that the contract entered into by the defendants was not, as alleged in the declaration, an unqualified engagement, but that it was limited by the memorandum on the ticket, and that the evidence supported the contract stated in the third plea. The learned Judge told the jury that the ticket delivered to the plaintiff constituted the proper evidence of the terms of the contract. That the plea, though in the words of the memorandum, did not, in his opinion, state the legal effect of the contract proved by the ticket; for, according to *Lyon* v. *Mells*(*a*), a contract in the terms of the ticket contained an exception in the case of injury arising from the insufficiency of the carriage provided by the defendants; if so, the plea was not proved by the ticket. The jury found that the carriage was defective, and caused the death of the horse, and gave a verdict for the plaintiff, with 183*l.* 15*s.* damages, leave being reserved to defendant to move to enter a nonsuit.

In Easter Term following, *Knowles*, Q. C., obtained a rule nisi accordingly, or for a new trial, on the ground of misdirection.

Jan. 22*nd.*

Martin, Q. C., and *Dearsley*, now shewed cause(*b*); and contended, that the ruling of the learned Judge was right;

(*a*) 5 East, 428.

(*b*) Before Lord *Denman*, C.J., *Patteson*, J., *Coleridge*, J., and *Wightman*, J.

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and that there was no variance between the contract declared upon and that which was proved. The defendants were liable as common carriers, and it was their duty to use due and ordinary care, and to provide fit and proper carriages. The legal effect of their contract to carry, was to carry safely and securely, "regard being had to the relative rights and duties of the parties:" *Ross* v. *Hill*(*a*). The limitation of the liability of the defendants contained in the ticket did not qualify the contract; it merely protected the Company from being liable in respect of unforeseen and unavoidable accidents: *Sleat* v. *Fagg*(*b*), *Birkett* v. *Willan*(*c*), *Bodenham* v. *Bennett*(*d*); and, notwithstanding such a notice, they were liable for gross negligence, which was proved in this case, as the defect in the carriage was pointed out to the defendants, who neglected to remedy it: Story on Bailments, 549, 562; Abbott on Shipping, 342; *Wyld* v. *Pickford*(*e*). They also referred to 1 Will. 4, c. 68. (The Carriers Act).

Knowles, Q. C., *J. Addison*, and *T. Barstow*, contrà, contended, that the contract relied on in the declaration was larger than that which was proved at the trial. The declaration stated that the defendants were liable for all accidents, and that they undertook, as common carriers generally did, to deliver the horse safe at Watford; that the special contract proved, undoubtedly excluded some, if not all, accidents; and, therefore, the defendants were entitled to succeed on the second issue, and the Judge should have directed the jury to that effect: *Dale* v. *Hall*(*f*). The defendants could not be charged as common carriers, for they were not bound to carry horses at all, and therefore might limit their responsibility upon

(*a*) 2 C. B. 877; 15 L. J., C. P., 182.
(*b*) 5 B. & A. 342.
(*c*) 2 B. & A. 356.
(*d*) 4 Price, 31.
(*e*) 8 M. & W. 443, 460.
(*f*) 1 Wils. 281.

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the contract to convey this horse: Story on Bailments, 551—557, *Nicholson* v. *Willan*(*a*), *Maving* v. *Todd*(*b*). In *Palmer* v. *The Grand Junction Railway Company*(*c*), *Parke*, B., questioned whether the rule as to the want of care applied to live animals carried on railways, as well as to goods and merchandise. But admitting, for the sake of the argument, that it did; as the defendants were not to be liable at all in a certain event, that event should have been negatived in the declaration. In *Latham* v. *Rutley*(*d*), *Abbott*, C. J., said, "The result of all the cases is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made, that, under certain circumstances, he shall not be liable at all, that must be stated:" *Howell* v. *Richards*(*e*), *Tempany* v. *Bernand*(*f*). Here the stipulation in the notice upon the ticket which points to particular goods, the subject of the contract, and expressly excludes the liability of the defendants as to them, is, in fact, a part of the contract entered into, and should have been declared upon as such: *Kirkman* v. *Shawcross*(*g*), *Harris* v. *Packwood*(*h*), *The East India Company* v. *Pullen*(*i*).

Cur adv. vult.

The judgment of the Court was now delivered by

Lord DENMAN, C.J.—This was an action on the case, to recover damages for the loss of a horse, by reason of the insufficiency of one of the carriages of the defendants in which the horse was conveyed from York to Watford. The declaration stated that the defendants were proprietors of the York and North Midland Railway, and of certain car-

(*a*) 5 East, 507.
(*b*) 4 Camp. 225.
(*c*) 4 M. & W. 749.
(*d*) 2 B. & C. 20.
(*e*) 11 East, 633.
(*f*) 4 Camp. 20.
(*g*) 6 T. R. 14.
(*h*) 3 Taunt. 264.
(*i*) 1 Str. 690.

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riages for the conveyance of passengers, cattle, goods, and chattels, upon the said railway, for hire; that they received nine horses of the plaintiff, to be *safely and securely* carried in the carriages of the defendants by the railway, for hire; and that, thereupon, it was the duty of the defendants safely and securely to carry, and convey, and deliver the horses of the plaintiff; and then averred the loss of one by reason of the insufficiency of one of the carriages.

The defendants pleaded, *first*, not guilty; *secondly*, that they did not receive the horses to be safely and securely carried and conveyed; and *thirdly*, that they received the horses subject to a contract that the plaintiff should undertake all risks of conveyance of the horses whatever, and that the defendants should not be responsible for any injury or damage to the horses, however caused, by travelling on the railway.

It appeared by the evidence, that the injury to the horse, which caused its death, was occasioned by a defect in one of the horse-boxes in which the plaintiff's horses were placed, and which defect was pointed out to the servants of the defendants, who tried, but unsuccessfully, to cure it. On the other hand, the defendants proved, that, when the horses were received, a ticket was given to the plaintiff, stating the amount paid by the plaintiff for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum:—"N. B.—This ticket is issued, subject to the owner's undertaking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, or in loading or unloading."

It appears to us to be clear, that the terms contained in the ticket given to the plaintiff at the time the horses were received, formed part of the contract for the carriage of the horses between the plaintiff and the defendants, and that the allegation in the declaration, that the de-

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fendants received the horses to be safely and securely carried by them, which would throw the risk of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket; and the alleged duty of the defendants safely and securely to carry and convey the horses, would not arise upon such a contract. It may be, that, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared, but has alleged a duty which does not arise upon the contract as it appeared in evidence. The rule, therefore, will be absolute.

Rule absolute to enter a nonsuit.

COURT OF EXCHEQUER.

Hilary Term, 1849

COOPER *v.* THE NORFOLK RAILWAY COMPANY.

Jan. 19*th*.

Where the steward of a manor was by custom entitled to one fee upon the surrender, and another on the admittance to copyhold lands: —*Held*, that, under the 95th section of the Lands Clauses Consolidation Act, he was entitled to one fee only on a surrender.

THE declaration stated, that the defendants were indebted to the plaintiff, being steward of the courts of the manor of Old Hall and Syrricks, in East Dereham, together with Yaxham, in the county of Norfolk, in 20*l*., for certain fees due and of right payable, according to the form of the statute in such case made and provided, by the defendants to the plaintiff, as steward of the courts of the said manor, for and on the inrolment of certain convey-

ances made to the said Company of certain copyhold tenements, parcel of the manor, and which conveyances were entered on the rolls of the manor by the plaintiff, as such steward, for the defendants and at their request. Plea, never indebted.

By an order of *Alderson*, B., the following case was stated for the opinion of the Court:—

By a statute, passed in the year 1846, intitled "An Act to empower the Norfolk Railway Company to make a railway communication between the Dereham branch of the Norfolk Railway and the towns of Wells and Blakeney, in the county of Norfolk," it was enacted, amongst other things, that the Lands Clauses Consolidation Act, 1845, should be read and construed as forming part of that Act.

By the Lands Clauses Consolidation Act, 1845, sect. 95, it was enacted, amongst other things, as follows, that is to say, "that every conveyance to the promoters of the undertaking of any lands which should be of copyhold or customary tenure, or of the nature thereof, should be entered on the rolls of the manor whereof the same should be held or parcel; and on payment to the steward of such manor of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof, he should make inrolment, and every such conveyance, when inrolled, should have the like effect in respect of such copyhold or customary lands as if the same had been a freehold tenure; nevertheless, until such lands should have been so enfranchised, by virtue of the powers thereinafter contained, they should continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed." The piece or parcel of land hereinafter mentioned, at the time of the conveyance thereof hereinafter mentioned, was, and from time immemorial had been, of copyhold tenure, and parcel of the said manor of Old Hall and Syrricks, and transferable

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to the use of any purchaser thereof by surrender and admittance, according to the custom of the manor. Upon every such transfer of the said piece or parcel of land, according to the custom of the manor, there were due and of right payable to the steward of the courts of the manor for the time being, certain fees, namely, on the surrender, for and in respect of such surrender, 10*l.*; and on the admittance, for and in respect of such admittance, 10*l.* The defendants, as promoters of the said Norfolk Railway, required the said piece or parcel of land for the purposes of the same railway, and agreed for the purchase of the same with W. Lee Warner, Esq., who was seised of the same in fee simple at the will of the lord and according to the custom of the said manor. By a certain deed poll, under the hand and seal of the said W. L. Warner, Esq., and dated the 22nd of January, 1847, the said W. L. Warner conveyed the said piece or parcel of land to the defendants.

It is admitted that the said deed-poll is such a conveyance of the said piece or parcel of land as the plaintiff was bound to inrol, according to the said provision of the Lands Clauses Consolidation Act, 1845, on payment of such fees as, according to that provision, were payable to him. On the 1st of February then next, the defendants applied to the plaintiff, then being the steward of the courts of the said manor, to enter the said conveyance on the rolls of the said manor, according to the provision of the said statute, which the plaintiff refused to do, unless the defendants would pay to him the same fees as he would be entitled to receive upon a transfer of the same tenements by surrender and admittance. The defendants denied that the plaintiff was entitled to any greater fees than those which would be payable in respect of a surrender without admittance; but it was then agreed between the plaintiff and the defendants, that the plaintiff should enter the said conveyance upon the rolls of the said manor, and that

the defendants should thereupon pay to the plaintiff such amount of fees as he the plaintiff was lawfully entitled to in respect of the inrolment of the said conveyance; and the plaintiff did inrol the said conveyance accordingly. This action has been brought to recover those fees.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the said sum of 10*l.* only, or the full sum of 20*l.*, from the defendants. The defendants agree that judgment shall be entered for the plaintiff for such sum as the Court shall direct, by nil dicit or otherwise, as the Court shall order.

Hugh Hill appeared for the plaintiff(*a*).—A liberal construction ought to be put upon the 95th section of 8 Vict. c. 18. The term "surrender" includes admittance also, as the lands pass by surrender only; and then the plaintiff is entitled to two fees, one for the surrender, and another upon an admittance. The legislature has used the words "surrender to the use of a purchaser," in opposition to a "surrender to the use of a will." If the construction contended for be adopted, then the steward will be deprived of a portion of his fees, not only on this transaction, but for ever afterwards. That was never intended by the legislature, as appears by the latter part of the section, which expressly enacts, that the lands shall continue subject to the same fines, rents, &c., until enfranchised under the provisions of the 96th section.

Unthank, contrà.—The words of a statute must be construed according to their ordinary meaning, unless there be something in the context shewing that a different construction was intended: *Mallan* v. *May* (*b*). In this manor one fee is payable on a surrender, and another on an admittance; the two things are quite distinct: 2 Bl. Com.

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.
(*b*) 13 M. & W. 511.

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368; *King* v. *Dilliston* (*a*). The claim of the steward must rest either on a quantum meruit or upon custom: he cannot rely upon the former, for no service has been performed; and as to the latter, it can only apply to the customary conveyance by surrender and admittance. It is clear, that enfranchisement may take place after surrender and before admittance; and in that case one fee only would be payable. [*Pollock*, C. B.—Might not the legislature have considered, that, inasmuch as there would be a great number of conveyances, one-half the amount of fees would be sufficient? *Alderson*, B., referred to *Evans* v. *Upsher* (*b*).] The steward will be no loser, as the Company are compelled by the 96th section to procure an enfranchisement. [*Parke*, B.—It was held, in *Wilson* v. *Allen* (*c*), that the heir might enfranchise though not admitted, and the same doctrine no doubt applies to surrenderees.]

Hugh Hill, in reply, cited *Becke* v. *Smith* (*d*).

Cur. adv. vult.

Feb. 14*th*.

PARKE, B.—The question in this case turns on the construction of the stat. 8 & 9 Vict. c. 18, s. 95. According to the ordinary meaning of the words used, the steward was bound to inrol on payment of such a fee as would be due to him on the surrender of the lands to the use of a purchaser; he would not have any claim for the fee due on admission also, for that is a different fee.

If this construction can be shewn to be at variance with the intention of the legislature, to be collected from other parts of the Act, or would lead to some manifest injustice, we might see if the language of the Act could be construed so as to avoid those results. On the first view it would

(*a*) 3 Mod. 221.
(*b*) 16 M. & W. 675.
(*c*) 1 J. & W. 611
(*d*) 2 M. & W. 192.

seem, that, as the legislature probably meant no one to be a loser by the powers given to the Company, it would be unjust to oblige the steward, for one fee, to perform an act equivalent to a surrender and admission, which, if the statute had not passed, would have entitled him to two. But on consideration it will be found that there is no injustice in the enactment. There are two reasons why the provision may be deemed a perfectly fair one: *first*, because the legislature may have considered, that if the Act had never passed, the steward would have had no fee at all, and besides, that the passing of the Act would cause an increase of his business, which would compensate him for the smaller fee; and a *second* reason is, that the effect of the parliamentary conveyance is to put the purchasers, the Company, substantially in no better position than if they had been mere surrenderees; for the next clause in the statute compels them to enfranchise the copyhold, and, as surrenderees, they might no doubt have done that without admittance: *Wilson* v. *Allen* (*a*). These reasons appear to us amply sufficient to prevent us from interpreting the words of the legislature in any other sense than according to the plain meaning of the words. We have no reason for supposing that the legislature intended differently to what has been said; there will, therefore, be judgment for the plaintiff for one fee, 10*l*.

Judgment accordingly.

(*a*) 1 J. & W. 611.

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IN CHANCERY.

BEFORE THE LORD CHANCELLOR.

Feb. 8th & 10th.

WILLEY *v.* THE SOUTH EASTERN RAILWAY COMPANY.

A Railway Company requiring a certain piece of land held by plaintiff for a term of thirteen years unexpired, gave him the usual notice to treat, and ineffectual attempts were made to settle the price by agreement. Nothing further was done until two years after, when the Company gave a bond and deposited the estimated value, and entered into possession. These proceedings were clearly informal, and the Company afterwards deposited the sum claimed by the plaintiff, and delivered a bond for that amount, which recited the quantity of land required, and was conditioned for the payment to him, his executors, administrators, or assigns, or into the Bank for his or their benefit, of such purchase-money or compensation as might be determined to be payable. The plaintiff filed his bill for an injunction:—*Held*, that the summary powers given by the 85th section of the Lands Clauses Consolidation Act are not confined to cases of pressure, and are not affected by the fact that sufficient time has been allowed to elapse for the Company to have ascertained the price by award or verdict. That, where the party dealing with the Company represents the entirety of a certain interest, it is sufficient that the condition of the bond be for payment to him, his executors, administrators, and assigns; and it is not necessary that the bond should contain the alternative, "for the parties interested in such lands." That a recital in the bond, of the quantity of land required out of a certain larger piece, is sufficient description to satisfy the terms of the 85th section. That an entry into the possession of land begun wrongfully does not preclude a Company continuing in possession when they have done all that was originally required to render their entry rightful.

From what date, whether from the date of the trespass or from the date of the rightful possession, interest on the purchase-money would be payable by the Company,—*quære*.

THE plaintiff in this suit was the lessee for an unexpired term of about thirteen years of a house and piece of garden ground situate at Charlton, in the county of Kent, comprised in and numbered 18 in the deposited plans and books of reference of the South Eastern Railway Company.

In August, 1846, the Company served the plaintiff with a notice of their intention to enter upon the land in question, for the purposes of their railway, and in December of the same year served him with another notice requiring him to treat for the sale thereof, and of all subsisting leases, estates, &c., therein. The plaintiff sent in a statement and claim within the twenty-one days prescribed by the 21st section of the Lands Clauses Consolidation Act, claiming in respect of his interest in the property and for compensation, the sum of 2350*l.*, or 1500*l.* if the Company would build a bridge to connect the severed parts of his garden.

No further steps were taken by the Company, until the month of July, 1848, when the plaintiff was called upon to appoint a surveyor, which he refused to do, but insisted on his former claim.

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The Company thereupon made an offer to the plaintiff of 473*l.* in respect of his leasehold interest in the land and compensation for damage, and offered to build him the bridge.

In the following month the plaintiff, by his solicitor, declined the offer; and shortly afterwards the Company served the plaintiff with a notice of their intention to take the land in question, under their compulsory powers, to apply for the appointment of a surveyor to determine the value, in order that they might deposit the same in the Bank of England, and gave a bond in the form prescribed by the 85th section of the Lands Clauses Consolidation Act (*a*).

(*a*) Sect. 85.—"Provides, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made, or verdict given for the purchase-monies or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the Bank, by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices, in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein, which such party is entitled to, or enabled to sell and convey; and also to give such party a bond under the common seal of the promoters, if they be a corporation, or, if they be not a corporation, under the hands and seals of the said promoters, or any two of them, with two sufficient sureties, to be approved of by two justices, in case the parties differ, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank for the benefit of the parties interested in such land, as the case may require, under the provisions herein contained, of all such purchase-money or compensation as may, in manner hereinbefore provided, be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of 5*l.* per cent. per annum from the time of entering on such lands until such purchase-money or compensation shall be paid to such party, or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being de-

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The Company then caused a surveyor to be appointed by one of the metropolitan police magistrates (a) for Woolwich, and he valued the plaintiff's interest at 740*l.*, requiring, however, the Company to build the bridge proposed by the plaintiff. The sum of 740*l.* was paid into the Bank of England by the Company; and a bond for that amount was delivered to the plaintiff, conditioned for the payment to him or for the deposit in the Bank of all such purchase-money and compensation as might be determined to be payable in respect of his interest, together with interest from the time at which the Company entered upon the land.

It was objected by the plaintiff, that the appointment of the surveyor and form of bond were not in compliance with the 85th section, and offers were made by him to the Company, with the view of settling the price by agreement.

In November, 1848, the Company entered and took possession of the land, and in the following month the plaintiff filed his bill praying an injunction to restrain the defendants from further entering upon or interfering with any part of the land therein mentioned, and from excavating or otherwise dealing with the same, until they should have complied with the provisions of the Lands Clauses Consolidation Act, 1845.

In January, 1849, the Vice-Chancellor of England granted an injunction, and in the following month the

livered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first deposited or paid the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special Act."

(a) It was presumed that one metropolitan justice was sufficient, because the 2 & 3 Vict. c. 71, s. 14, authorised any one of the magistrates of the metropolitan police courts to do all such acts as were by any law, not containing an express enactment to the contrary, directed to be done by more than one justice.

Company deposited the full sum of 2350*l.* claimed by the plaintiff, in the Bank of England, when the following receipt was handed over to the Company:—

"Received, pursuant to an Act of Paliament &c., of the South Eastern Railway Company, the sum of 2350*l.*, which money is placed to the account of William Russell, Esq., as Accountant-General of the Court of Chancery, and to the credit of Ex parte the South Eastern Railway Company, the account of Richard Willey."

The Company then delivered to the plaintiff a bond with two sureties, dated 2nd of February, 1849, for the full amount of 2350*l.*, which recited that the Company required, for the purpose of their intended railway, a piece of land situate and containing 1 rood, 8 perches, being parcel of the piece of land and premises particularly mentioned and referred to in the map or plan and book of reference of the said railway, &c., by No. 18, in which the plaintiff was or claimed to be interested; that no agreement had been come to, or award made, or verdict given, in pursuance of the provisions of the Lands Clauses Consolidation Act, for the purchase-money or compensation to be paid by the said Company in respect of the interest of the plaintiff in the hereditaments and premises; that the sum of 2350*l.* was the amount claimed by the said plaintiff for his interest in the said lands and hereditaments; and that the Company had deposited that sum in the Bank of England. The condition of the bond was for payment by the Company "to the said Richard Willey, his executors, administrators, or assigns, or for the deposit in the Bank of England, as the case may require, for his or their benefit, under the provisions of the said Lands Clauses Consolidation Act, of all such purchase-money or compensation as may in manner by the same Act provided be determined to be payable by the said Company in respect of the in-

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terest of the said Richard Willey in the said hereditaments and premises, together with interest thereon at the rate of 5*l.* per cent. per annum from the time of entering upon the said hereditaments and premises by the said Company until such purchase-money shall be paid or deposited as aforesaid."

The day following the day of the date of the bond, the Vice-Chancellor dissolved the injunction, whereupon the present motion was made before the Lord Chancellor by way of appeal, to restore the injunction.

Mr. *Rolt* and Mr. *Bagshawe*, in support of the motion, contended that the summary powers of entering upon land conferred by the 85th section, were only so given with the view of enabling the Company to take possession of land, where it was required sooner than the proceedings by arbitration or a jury could be gone through. Those powers were only to be exercised in cases of pressure. The only proper mode by which the legal right to land could be acquired by the Company was by settlement of the price and payment of the purchase-money, but the legislature had thought proper to give, in special cases, a right of entry on certain terms. The present was not one of those special cases. The Company gave their first notice in August, 1846, but did not enter until November, 1848, and they had, by their negligence, lost their special remedy. They also contended, that the bond provided only for the interest of the plaintiff in the land taken, and not for the interest of the other parties interested in such lands, omitting the alternative form given by the 85th section, which was intended for the protection of the interest of absent parties: *Poynder* v. *The Great Northern Railway Company* (*a*). The form of the bond ought to have been for payment to the plaintiff, or "other the parties interested in," &c. A similar objection arises in the manner in which the money has

(*a*) Ante, Vol. 5, p. 196.

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been paid into the Bank. There is also a defect in the bond, in that it does not sufficiently identify the land; and further, the entry by the Company, which was in its commencement wrongful, cannot be set right by the delivery of a new bond.

Mr. *Bethell* and Mr. *J. Baily*, contrà.—When a mistake has been made in any of the proceedings of a Company under an Act of Parliament, they are not to be deprived of the benefit which the legislature has given them, but liberty will be given them to set themselves right: *Barker* v. *The North Staffordshire Railway Company* (*a*). It is quite true that the form of the Act provides for an alternative condition, in the event of the party to whom the bond is given not representing the entire interest which the Company are purchasing; but, in this case, the plaintiff is the sole party interested in the lease, and, therefore, there is no necessity for inserting the alternative form. The objection, that the 85th section is only applicable to special cases, is not borne out by the language of the Act. The Company may at any time discover that they want more land, and there is nothing to prevent them from availing themselves of their summary powers at the latest moment to which those powers are extended (*b*). Again, the land is sufficiently identified by the bond, for it recited, that a certain quantity of a particular plot of ground, numbered in the deposited plans 18, is required by the Company; and the Company having already entered and taken possession of that piece, there cannot be any farther or better description than that given by the bond.

Mr. *Rolt* replied.

The LORD CHANCELLOR.—The question is, whether any *Feb.* 10*th.*

(*a*) Ante, Vol. 5, p. 401.

(*b*) See *Stamps* v. *The Birmingham, Wolverhampton, and Stour Valley Railway Company*, post, p. 123.

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case has been made out that the Company have been guilty of irregularity in the course which they have pursued, or in the bond which they have given, so as to justify the Court in restraining them from proceeding with their works, or dealing with the land under the authority given by the Act.

The plaintiff claiming to be, and being as the Company are willing to assume, the lessee for a certain number of years of the land in question, they have given him a bond, according to the provisions of the Act, in the following form: [His Lordship then read the condition of the bond (*a*).]

Now, by the Act, whether the Company choose to purchase by agreement, or by arbitration, or by going before a jury,—the various modes by which the Company are authorised to take possession of land,—two states of circumstances are contemplated. They may deal with a party upon his own title, and so can conclude the contract with him; or he may be a party not having the whole interest in himself, but authorised to sell under the provisions of the Act. In the latter case, he is, of course, not entitled to receive the purchase-money himself, but provisions are made for securing it for the protection of those who may be entitled to a certain portion of interest in the estate taken. But if the Company deal with a party upon his own title, there are circumstances under which he may not be entitled to receive the money until he has done certain acts; for instance, if he refuse to convey, or if he decline to make out his title under the provisions of the Act, the money would not be paid to him until he had complied with those provisions, but would in the meantime be paid into the Bank of England. It, therefore, does not follow, that, because the Company recognises him as the owner of the interest purchased, the money should of necessity be paid to him, at least in the first instance.

(*a*) Ante, p. 103.

[His Lordship, having read the 85th section of the Lands Clauses Consolidation Act (*a*), proceeded as follows:—]

Now, under the provisions of that section, it may be that the Company are dealing with a party who is not the actual owner, but who has the power to sell. In that case the money would come into the Bank. So, they may be dealing with a party whose title the Company are willing to recognise; but still, a case may arise in which he would not be entitled to the payment of the money into his own hands. Therefore, the object of that section was evidently not to affect the prior power, but to take care that, in every case, provided the Company did what was required to be done by them under that Act, in order to place the parties entitled to the land in a secure position with regard to the value of their interest, the Company might enter on the land and carry on their works, notwithstanding they had not become the purchasers of the land, but had deposited the amount in the Bank, or had given security for ultimately giving to the parties interested all the benefits which the Act intended they should have in compensation for their land.

In this case the Company have dealt with Mr. Willey as the owner of the lease: they were perfectly competent to do so. If they agreed with him, and ascertained the value of the leasehold interest, having bought his lease at a price so agreed on, they were not bound to look to any other parties; because they at their own risk deal with him as owner of the lease, and he claims as owner of the lease. Still they have to require from him, before he can receive the value of the land which the Company have taken, the performance of certain acts by which their title is to be completed. He must assign to them the lease; he must part with that which they have purchased before he can call upon them to part with the purchase-money. The mode in which the ques-

(*a*) Ante, p. 101, n.

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tion arises here is, they only require to have the money kept in safety until the time should come when Mr. Willey should have become entitled to the money, upon the terms of doing all that he is compellable to perform before he can receive it. The bond, therefore, provides precisely for that event; nor do I know in what language that can be better provided for. It may be true, that Mr. Willey might not have been entitled to receive the whole of the money; that is to say, the Company might have dealt with a party under the provisions of the Act, not under his estate, but under his power of selling. But that is not the case here. Here they have dealt with him in respect of his own interest, and are willing to deal with him and to purchase his interest only; requiring that they may have the means, as against him, of compelling him to deal with that interest so as to vest it in themselves.

Now, the case of *Poynder* v. *The Great Northern Railway Company*(a) has been compared to this. I have looked at it several times in order to find out the similarity, but I cannot discover it. The Company did not, in that case, deal with the party as having the beneficial interest; but, on the contrary, the bond was in the general terms of the Act, which are in the alternative, so that they might embrace the particular or any other interest. The money might be paid into court, not for the benefit of the party with whom they contracted for a particular interest, but paid into court for security and for the benefit of those entitled to other interests in the land. And the difficulty as to the bond there was, that, though the money appeared to be paid into court upon both alternatives, in the language of the Act, they made it payable to the party *on demand;* so that there was an inconsistency in the condition of the bond. It did not appear that it was paid on account of the owner of the land, but on one or other account, and

(a) Ante, Vol. 5, p. 196.

yet it was made payable to him on demand. The objection felt to that condition was, if it was payable to one individual, there was nothing to shew that that individual was the party entitled. Therefore, I altered the condition of the bond by leaving out the word "demand," and putting in the words which are here, "payable as the case under the Act might require," or something of that sort. You might suppose, therefore, that this bond was actually taken from the decision I came to in the case of *Poynder* v. *The Great Northern Railway Company*, and really that point has nothing to do with the present case; because here the Company have thought proper to deal with the individual in respect of his individual interest.

There were several other points taken, which I will shortly advert to. First of all, that the land was not identified. There is no question about the identity of the land. The parties have given notice to purchase the land, and the whole object of this bond is to secure the money payable in respect of that purchase, when it is ascertained. The Company gave notice of their intention to purchase a certain piece or portion of a piece of land numbered 18, which portion is described. That description is not objected to; and there is no matter of question between the parties, and the Act raises no question whatever as to the identity of the land. The 85th section only provides the means by which the Company may take possession of the land identified by the prior transactions, and secure the payment of the purchase-money to the party entitled.

Then comes another objection, that, inasmuch as possession had been taken of the land before the bond was given, it was not a taking possession under the Act. That was exactly the case in *Poynder* v. *The Great Northern Railway Company*. There had been possession under a defective bond. If such an objection were to prevail, it might come to this, that the 85th section could never apply at all, if there had been any mistake in the bond—

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that is to say, if the exact provisions of the Act had not been complied with in the first instance, the whole of the 85th section would be done away with; because according to the argument, it would not be a taking possession under that section. It is impossible to maintain that; and, although this Court has very beneficially interfered to prevent abuses of power by these great Companies, yet there must be something like equity as the foundation of the Court's interfering upon the mere abuse of power, which is the ground for injunction. Here, however, the party is asking, by a forced construction to be put upon the 85th section, to strike it entirely out of the Act. Now, if the Court finds the means of doing justice between the parties, the Court will not interfere, except under such rules and provisions as may be useful and equitable for that purpose; and the Court, therefore, will not deal with an injunction, otherwise than by seeing that each party has that to which each party is entitled. There is possession taken, it is supposed erroneously taken, because the provisions of the bond are not according to the Act; and in this case, as in *Poynder's case*, it was taken under a bond, which was not within the provisions of the Act. Still I dealt with it as a possession: whether taken *de novo*, or to be continued in the hands of the Company under the provisions of the Act, is not material. But the Company, having given to the owner of the land the benefit which the Act intended he should have, the Court did not treat that as a possession not according to the provisions of the Act,—not being within the provisions of the Act,—but dealt with it as being within the Act itself. I consider that not only as correct under the terms of the Act itself, but a point upon the Act actually decided by the Court in other cases.

The condition of the bond I have already observed upon.

Then, upon the fourth point, namely, that the money was paid into the Bank, to the account of Willey: on that, as I have already said, if the Company think proper to deal

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with Willey as the owner of the land, it is quite right to pay it into the Bank on his account, because the Company recognises the title to the piece of land which they want to purchase; and it may very properly remain in the Bank until he performs that duty which he is bound to do.

There is one other point, which is, I confess, of some difficulty, but I do not think that it interferes with the course to be adopted as the result of the present case, because it does not immediately occur; which is as to interest from the time of entering into possession. The Act provides, that interest shall be calculated from the time that the parties enter into possession; and a question, no doubt, may arise, when was the entering into possession. Because, if the Court finds that the bond was not according to the provisions of the Act, but that the Company entered into possession under an erroneous bond, not good under the provisions of the Act, then, when the consideration arises as to what interest is to be paid, the question may arise, whether the interest is payable from the time of the original possession, (not being a possession under the 85th section,) or whether it should be calculated from the time at which the possession was set right by the condition of the bond being corrected. That does not appear to me to be at all a difficulty that affects the question of the injunction. Whether Willey or any other party, where the possession taken was irregular, because the provisions of the Act had not been complied with, has a right to treat that possession as a trespass or not, or whether to treat it as a rightful possession, and subjecting the Company to the payment of interest from that time, is a matter that does not arise on the question as to the injunction. It is a matter that may be material to be considered in some future stage of the transaction between the parties, but it is not one that at all affects the question of injunction.

I think, therefore, this is a case in which the Company are right in the bond given, and that they are right in their

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course of proceeding, under the provisions of the Act; and that they are now rightfully in possession, under the terms of the 85th section; and the motion must be refused, with costs.

BEFORE THE LORD CHANCELLOR.

Dec. 12th.

JACKSON *v.* THE NORTH WALES RAILWAY COMPANY.

A Company, incorporated by Act of Parliament, advertised for tenders for the formation of their line of railway. The plaintiff sent in a tender for a portion of the work, which was accepted by the engineer of the Company, authorised to act on their behalf, and such consent was recognised by the directors at a board meeting. Nothing further was done, and no specific contract, in a legal form, was reduced into writing to which the seal of the Company had been affixed. The plaintiff, in consequence, as he alleged, of the acceptance of his tender, went to a great outlay, in order to be prepared for proceeding with the works; but the whole scheme being afterwards abandoned, the directors refused to allow him compensation for the expenses incurred. The plaintiff filed his bill for relief, whereupon the Company demurred generally for want of equity. The Lord Chancellor allowed the demurrer, and *held*, that where, by legal enactment, certain formalities are required to render contracts legally binding on the parties, the want of such formalities will not be a ground for giving jurisdiction in equity in matters to which such jurisdiction would not otherwise be extended. That, on argument of demurrer, the mere allegation of trusteeship, which is a conclusion of law, is not of itself sufficient, but the case made must support the allegation.

THE bill in this case was filed by the plaintiff, a contractor for railway works, against the North Wales Railway Company, praying compensation and other relief in respect of damage sustained by him by reason of the Company having abandoned a contract which the plaintiff alleged had been entered into with him for the formation of certain parts of the line. The facts were as follow:—

The North Wales Railway Act, with which the Lands Clauses Consolidation Act was incorporated, having passed, the Company thereby formed proceeded to purchase land; and specifications of the different works, plans, &c., were drawn up by Sir John Rennie, the engineer of the Company. The Company then advertised for tenders, and in answer thereto the plaintiff wrote as follows:—

"North Wales Railway.

"Tender for Works from Bangor to Carnarvon.

"To the Directors of the North Wales Railway Company.

"Feb. 5th, 1846.

"Gentlemen,—I hereby undertake to make the line of railway for a distance of 8$\frac{5}{8}$ miles, agreeable to the plans

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and to the satisfaction of Sir John Rennie, for a double line of works, and providing rails, chairs, sleepers, pins and keys, points and crossings, fencings and ballasting, for the sum of 141,000*l.*, the whole to be done in a complete and workmanlike manner, and finished by the 31st of July, 1847. For a double line of works, and a single line of permanent way, the amount will be 89,000*l.*: the amount of 45,000*l.*, provided for stations, to be added to each of the before-mentioned amounts."

On the 16th of February, 1846, Sir John Rennie wrote to the plaintiff as follows:—

"North Wales Railway, Adam-street.

"16th February, 1846.

"I beg leave to inform you, that the North Wales Railway Company have accepted your tender, the Board reserving to themselves the power of hereafter determining whether a double line or single line of works shall be adopted. I further beg to inform you, that the Board have expressed a wish to have an interview with you on Thursday next, and I will thank you to make it convenient to attend: the hour of meeting shall be sent to you.

"I am, your obedient servant,

"JOHN RENNIE.

"Mr. THOMAS JACKSON, Pimlico.

"P. S.—I will thank you to acknowledge the receipt of this letter.—J. R."

The bill stated that the plaintiff acknowledged the receipt of the letter, and attended the Board, when he was informed by and on the behalf of the defendants, that Sir John Rennie had been fully authorised to accept the plaintiff's tender, and to bind the defendants by the acceptance thereof. That the plaintiff, being bound by his letter to complete the work he had undertaken by the 31st of July, 1847, was compelled, on the receipt of Sir John Rennie's letter, to commence arrangements for ex-

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ecuting the works, by purchasing rails, sleepers, and other plant, and engaging persons to work under him, and incurring other preliminary expenses, without which he could not have been in a situation to complete the work by the specified time. That these arrangements were complicated and expensive, and proceeded without interruption from the month of February, 1846, until after the receipt of a letter hereinafter mentioned; but the greater part of the liability and expenses were incurred before the end of February. That, between the receipt of Sir John Rennie's letter, in February, 1846, and May following, the plaintiff expended and agreed to expend large sums in the matters before mentioned, with the knowledge of the directors of the Company and those who acted in the management thereof, and in the belief, as had been represented to him, that they had legally bound themselves by the acceptance of the tender. That those who had complete power to bind the Company by any contract, and were authorised to manage their affairs, induced, and were authorised to induce, the plaintiff to make the expenditure, representing, as they were authorised to do, that the contract was complete, and that both the plaintiff and the Company were bound by the letters of the 5th and 16th of February, 1846.

On the 5th of May, 1846, the plaintiff received from the secretary of the Company the following letter:—"North Wales Railway. The board of directors having had it intimated to them, at their meeting this morning, that you propose proceeding with the works on the proposed railway, and with that view are procuring materials, and this, too, in the absence of any existing contract, and notwithstanding what passed between Sir J. Rennie and yourself on the 2nd of April last, and then communicated by the former to the Board who were sitting, I am directed to request the favour of your attendance at the Company's offices on Thursday next, the 7th instant, at twelve o'clock precisely, to meet the directors, as, on a personal interview,

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all misunderstanding will be probably removed. Sir John Rennie has also been summoned to attend." That the plaintiff attended the Board on the 7th of May, and on the 8th of May wrote the following letter to the Company's secretary:—"Having waited on the Board of Directors of the North Wales Railway Company yesterday, agreeably to the wish expressed in your letter to me of the 5th instant, I have to regret having been told at that meeting that the Board did not think themselves justified in allowing me to proceed with the works on my contract with them for that portion of the line from Bangor to Carnarvon; and the reason given for not allowing me to proceed was, if we the directors make calls on our proprietors, we much fear they will not be paid, consequently we cannot pay for the works as they proceed. I beg to say, that any proposition the directors may wish to make to me, shall have my immediate attention." That in reply the plaintiff received a letter from the secretary, dated the 16th of May, as follows:—"I have omitted noticing your letter of the 8th instant, in consequence of my having thought there would have been a board meeting this week, when I would have submitted the same for their consideration; but no such meeting taking place until Thursday next, I think it right to state that the letter will then be laid before the Board. I beg to remark, that the account you give in your letter of what transpired at the Board when you attended, is quite contrary to my recollection of what then passed, as it was clearly intimated to you that there was no existing contract; and the reason of requesting your attendance was given solely because the Board had heard of your proceeding with the works in the absence of such contract."

On the 21st of May, the plaintiff received the following letter from the secretary:—"In accordance with my note, your letter of the 8th instant was laid before the Board at their meeting held this day. I am instructed to forward

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you a copy of the Resolution in regard to the same:—'Resolved, that this Board, having had read to them a letter from Mr. Jackson, cannot but express their surprise at its tenour, as it gives an erroneous account of what passed at the interview between them and Mr. Jackson, and the Board approves of the letter the secretary wrote Mr. Jackson in reply, also read to them; and that, with a view to prevent any possible misunderstanding between them and Mr. Jackson, they at once disclaim any liability or responsibility on account of any works or expenses already done or incurred by Mr. Jackson, there being no existing contract; and also will not sanction or authorise any future works or expenses on the part of Mr. Jackson until a regular and legal contract has been prepared and completed between the Company and Mr. Jackson.'"

On the 25th of May the plaintiff wrote to the secretary as follows:—"I have to acknowledge the receipt of your letter, dated the 21st instant, containing a copy of a Resolution passed by your Board, and, in answer to the same, I give you, for the information of the Board of Directors of the North Wales line of railway, notice, that I hold them responsible for any loss or inconvenience I have or shall be put to arising out of the nonfulfilment of the agreement entered into with me by them for the works on that portion of the line from Bangor to Carnarvon." That, on the 28th, the plaintiff received another letter from the secretary, in these terms:—"I beg to inform you that the Board have given directions to their solicitor to prepare a contract in accordance with the terms of the specification, which, when ready, will be forwarded to you."

The bill alleged that the communications of the Company were attempts to escape from liability they had justly incurred; and that, on the 27th of July, 1846, the draft of a contract was sent to the plaintiff by the defendant's solicitor, which contained stipulations at variance with the advertisements and the two letters of February, 1846, and un-

usual, and such as plaintiff, under the circumstances, could not acquiesce in. And that, amongst other things, there was this proviso:—'Provided also, and it is hereby further covenanted, declared, and agreed between the said parties hereto, and particularly on the part of the said Thomas Jackson, that in case it shall not be convenient for the said Company or their agents to pay to him the sum or sums of money payable to him upon the certificate of the said principal engineer for the time being of the said Company, as hereinbefore mentioned, he shall and will consent to leave in the hands of the said Company for such reasonable time as may be required by them, not exceeding the term of two years, a sum of money not exceeding the sum of 40,000*l.*, over and beyond the reserved fund of 10*l.* per cent. as aforesaid, and the amount of the several deductions as aforesaid, for which interest at the rate of 4*l.* per centum shall be paid to him or them. And in case of such money being left in the hands of the said Company, they shall, by a bond or bonds, under the common seal of the Company, secure the payment of the same to the said Thomas Jackson, his executors or administrators, with interest for the same, after the rate of 4*l.* per cent. per annum.'" That the plaintiff returned the draft, and referred the defendants to his tender of the 5th of February, 1846, stating he was prepared to abide by it. That the plaintiff had ascertained that the defendants had not manifested their acceptance of the tender by affixing their corporate seal to any document whatever, or by the signature of two or any of the directors; and that, notwithstanding the representation aforesaid, divers persons, on behalf of the Company, were authorised to induce the plaintiff to incur the liabilities and expenses. That the affixing the seal, as well as the signature of the directors, was fraudulently withheld, in order that defendants might obtain the benefit of the plaintiff's preparations, or repudiate the contract. And that the defendants had repudiated the rights of the plaintiff, and fraudulently declined to recognise the two letters of February, 1846, by affixing

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their seal thereto, or to any document referring or relating to the same, so as to bind them in a Court of law; and they declined to execute any contract whatever pursuant to the letters, or to recognise the plaintiff as having contracted with them, and they were taking steps to dissolve the Company. The bill then set forth in detail the particulars of the plaintiff's claim, amounting altogether to 3926*l.*; and alleged that the plaintiff was willing to perform his contract; that he was unable to proceed at law; and that the matter could only be settled by a reference to the Master. The bill further charged, that they had funds in their hands, of which they were trustees on behalf of the plaintiff; or, if they had no funds, they had power to obtain them for the purpose of paying the plaintiff.

The bill prayed that it might be declared, that, under the circumstances herein mentioned, "the said defendants are liable to plaintiff in respect of the matters herein mentioned for all damages and losses sustained by him; and that it may be referred to one of the Masters of this honourable Court to inquire and state the amount of such damages and losses, or otherwise that an issue or issues may be directed, for the purpose of ascertaining the same and that proper directions may be given in that behalf; and that the said defendants may be ordered to pay to plaintiff the amount of such damages and losses as shall be ascertained by such of the aforesaid means as may be deemed most fitting and proper, or that the said defendants may be ordered to affix their corporate seal, or procure the signature of two directors, to the said letters of the 5th day of February, 1846, and the 16th of February, 1846, or to some document referring thereto and accepting the terms thereof, so as legally to bind the said defendants; or otherwise that a proper contract, according to the terms of the said letters, may be settled and drawn up, and that the said defendants may be ordered to affix their corporate seal or to obtain the signature of two directors thereto, and may be ordered, on the trial of such action or actions as the plain-

tiff may bring against the said defendants in respect of the matters aforesaid, to admit that the said letters or other documents, or the said contract, as the case may be, were and was duly and legally executed by them, either under their corporate seal or by the signature of two directors, on the 16th day of February, 1846, or on such other day in the said month of February as to this honourable Court may seem meet. And that the said defendants and their agents may be restrained by the order and injunction of this honourable Court from setting up any inequitable defence in such action or actions as may be brought by plaintiff; and from parting with or assigning their property, money, or funds, including therein the said trust-money, in order to defeat process or execution on the part or behalf of the plaintiff."

To this bill the defendants, the Company, demurred generally, for want of equity; and the demurrer was argued before his Honor, Vice-Chancellor *Knight Bruce*, who overruled it, on the ground that the allegation in the bill, as to the Company having money in hand for the especial purpose of paying the plaintiff, and that they had been constituted trustees for him, saved the bill from the demurrer. He, however, observed, that the case made was a very unsatisfactory one, and the equity infinitesimally small, and, but for the allegation of trusteeship, he should have allowed the demurrer.

Mr. *Bacon* and Mr. *J. H. Palmer*, for the Company, contended, that the directors had only the power of binding the Company by certain forms, and in a certain manner, prescribed by their Act, and that the plaintiff must be held to be cognisant of the only way in which a legal and binding contract could be entered into with the Company: *Kirk* v. *The Bromley Union*(*a*).

Mr. *J. Russell* and Mr. *Giffard*, in support of the bill,

(*a*) 2 Ph. 240.

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contended, that the principle involved in this case did not differ from the class of cases in which specific performance of parol contracts was sought. But the present case shewed a further equity; for the allegations in the bill were, that the contract had not been executed in consequence of fraud on the part of the Company. This took the case out of the decision in *Kirk* v. *The Bromley Union;* and that, independently of this, the grounds on which the *Vice-Chancellor* had overruled the demurrer were amply sufficient to support the bill.

The LORD CHANCELLOR.—I agree in the opinion of the Vice-Chancellor *Knight Bruce* as to the want of equity in this case. The contract, if it was a contract at all, was to make a portion of the railway. That most nearly resembles a covenant to build, which this Court will not enforce or interfere with. The question then arises, whether what is alleged to have taken place in this case is sufficient to constitute such a contract as this Court will carry into effect. The contract was made, not by the defendants, but by their agents. It was comprised in a proposal made by the plaintiff in the alternative, and the charge in the tender was so much for a single, and so much for a double line of rails. That alternative was never decided on. It is said, that the party who made the contract was the authorised agent of the Company; that the directors had, by law, and by their Act of Parliament, power to charge and bind the Company by a particular mode of proceeding, but that they had no other power or means of doing so. As to the facts, that the Company recognised Sir John Rennie as their agent, and that he had their authority for doing what he had done, and that the plaintiff has incurred certain expenses in preparing for the performance of his contract, I cannot see that these circumstances distinguish this case from *Kirk* v. *The Bromley Union.* In that case, there was a binding contract between the plaintiff and defendants for certain works; and it was provided,

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that if any alterations were required, certain forms should be adopted in ordering them. Of course, no alterations would be sanctioned, so as to create a right, on the part of the plaintiff, to demand payment, unless those forms were followed out. But the parties did not comply with those forms, and, according to the opinion of the Vice-Chancellor, they had waived them; and then, the forms not being followed out, but the defendants having encouraged the builder in making those alterations, and having done everything which would bind an individual, the question was, whether such a state of things did not supersede the necessity for a contract as to any such work. What I said was, "that this Court will not, in general, assume jurisdiction over such a contract, is clear." The recent decision of the Master of the Rolls, in *Ambrose* v. *The Dunmow Union*(*a*), is, I believe, the latest authority, and distinctly proceeds upon that principle. So, the question in that case, of *Kirk* v. *The Bromley Union*, was really reduced to this: Did the statement in the bill, as to these extra works and deviations, give the Court a jurisdiction, which, without such special facts, it would not have had? The Vice-Chancellor put his decision upon a well-known rule, that, notwithstanding an express stipulation in a contract, the parties may by their conduct waive it; and that, in that particular case, the provision, that the defendants were not to be bound by any order for an alteration or deviation, unless in writing, did not prevent the plaintiff from enforcing payment in this Court, of the amount and value of such alteration and deviation, inasmuch as the defendants had by their conduct induced him to believe that he would be paid for the same, and they would, therefore, be guilty of a fraud in withholding payment. This result would follow from any case in which a party could not recover his debt at law for want of writing; but that cannot be contended for, for the mere inability to enforce a legal debt

(*a*) 9 Beav. 508.

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at law does not give the party a remedy in equity. The case was compared to bills for specific performance of parol contracts; but in those cases the Court has jurisdiction in the original subject-matter, that is, the contract; and the question is, whether the want of writing shall deprive the Court of it. Here the attempt is to make the want of writing the ground of jurisdiction; but if this principle be sound, why may not all parol contracts which the Statute of Frauds requires should be in writing, be enforced in equity, where the plaintiff has acted upon the faith of the contract with the knowledge of the defendant? One question between the parties is: Does the provision in the contract protect the defendants against the performance of their parol contracts? The bill assumes that it does, by praying that the defendants may not be permitted to set up the objection. Then comes the other point. The bill alleges that the defendants are trustees for the plaintiff, as to certain monies which they retain in their hands for the special purpose of paying him. But he is bound to shew how that trust arose. Can a party come here and say that a defendant is a trustee and be under no necessity to give the Court any information how the trust was created? The allegation of trust is merely a deduction of law. If the acts constitute a trust, the Court will exercise its jurisdiction in respect of it, but no such consequence will follow merely because a party alleges that there is a trust, without shewing how it arose. But the party shews here that no trust could have arisen. How could the Company have become trustee for him? The bill alleges, that they have monies in their hands to pay him, and that, as to those monies, they are trustees for him. But, according to his own bill, he has no other connexion with the Company, except that he was induced to believe that he should have a contract with them, and in consequence of that belief incurred certain expenses. The trusteeship is a conclusion of law; but although the plain-

tiff is pleased to call it a trust, that will not affect the jurisdiction of this Court, where, according to the facts which are alleged, there is no trust. The Vice-Chancellor seems to have been of opinion, that the allegation of trusteeship created a sufficient equity to sustain the bill, although it was an infinitesimally small degree of equity. My opinion is, that this equity is quite evanescent, and that, therefore, the demurrer ought to be allowed.

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BEFORE VICE-CHANCELLOR WIGRAM AND THE LORD CHANCELLOR.

STAMPS *v.* THE BIRMINGHAM, WOLVERHAMPTON, AND STOUR VALLEY RAILWAY COMPANY.

1848.
June 28th.
July 3rd & 8th.

A Railway Company served a notice on the owner of houses and property, situate on a hill, that they required so much of the land as would be necessary to construct a tunnel, but having, in the course of their works, endangered the foundation of the plaintiff's houses, he filed his bill and obtained an injunction. The Company put in their answer to the bill, and subsequently gave a second notice, and took the necessary steps for entering upon the whole of the plaintiff's property, under the 85th section of the Lands Clauses Consolidation Act.

The Company moved, on affidavits, to dissolve the injunction:—*Held*, by Vice-Chancellor *Wigram* and the Lord Chancellor, that, after answer filed, the proceedings subsequently taken by the Company could not be brought before the Court by affidavit, but must be placed at issue between the parties, by filing a supplemental answer.

That, under the Lands Clauses Consolidation Act, the powers of Railway Companies to take lands within the prescribed limits, are not exhausted by one notice, or one taking, if further land is required for the purposes of their Acts.

THE bill in this cause was filed on the 13th of October, 1847, by J. Stamps, the lessee of certain premises consisting of houses, warehouses, a shop, and cellars, in Birmingham, against the above-named Company, praying that they might be restrained by injunction from proceeding with the formation of a tunnel, which they were then in the course of constructing under the plaintiff's premises, so or in such manner as to destroy, damage, weaken, or interfere with their premises occupied by him or his undertenants, or the foundations thereof; and also from doing any act whereby the said messuage and premises, or any

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of them, might be injured; and that an account might be taken of the damage and injury already sustained by the said messuages and premises, and of the sum of money necessary to restore the same, and that the same, when ascertained, might be paid by the Company.

The facts were as follow:—

On the 24th of December, 1846, a notice was served on the plaintiff, whereby the Company required to purchase and take, for the purpose of their Act, "such part of all that piece or pieces of land or ground as is required and intended to be permanently occupied by and for the purpose of making and maintaining the tunnel, railway, and works authorised by the said Act," &c.; and requiring particulars of plaintiff's claim, &c. Some communications passed between the agents of the plaintiff and of the Company, with reference to the purchase, but no agreement was come to between the parties.

On the 29th of June, 1847, the Company deposited in the Bank such a sum of money as was determined by a surveyor appointed by two justices to be the value of the land to be taken, and delivered to the plaintiff a bond, with two sureties.

The contractor for the Company's works then entered on the premises, and commenced the construction of the tunnel, and, for that purpose, proceeded to blast the sandstone or rock through which they had to bore, by which they shook and endangered the plaintiff's premises. He thereupon filed his bill, and in the same month of October obtained an injunction in the terms of the prayer hereinbefore stated.

On the 12th of February, 1848, the defendants filed their answer, not denying the plaintiff's case, but stating that the Company had been advised that all the premises of the plaintiff were required for the purposes of the railway, and that they intended to purchase and take the same under the powers and provisions of the Lands Clauses Con-

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solidation Act; and that they did not intend to proceed with the construction of the tunnel until they should have entered and taken possession under the Act, and paid the full value and compensation; and they further offered, that, if the plaintiff would abstain from further prosecuting his suit, they would pay him his costs.

Nothing was done by the Company until the month of May, 1848, when, being desirous of entering upon and using the plaintiff's messuages and land, they applied to two justices to nominate a surveyor, to determine the value of the plaintiff's interest; and such surveyor, on the 12th of May, determined the sum of 1020*l.* to be the value of the interest of the plaintiff in the premises, and annexed to his valuation a declaration of the correctness thereof; and on the 10th of June following, the defendants paid the said sum of 1020*l.* into the Bank of England, and delivered to the plaintiff a bond dated the 16th of June, under the common seal of the Company.

The surveyor, after having valued the plaintiff's estate and interest in the premises, on the 12th of May signed and annexed to his valuation a more formal memorandum of such value, dated the 12th of June, 1848.

On the 13th of June, one of the contractors of the Company, believing, as was deposed by affidavit, that the Company had purchased the land, but without any authority, expressed or implied, on the part of the Company, proceeded with the works, and commenced blasting the rock; whereupon the plaintiff gave notice of motion for a sequestration to issue against the Company, upon the allegation that the Company had committed a breach of the injunction.

At the same time, the Company gave notice of motion to dissolve the injunction, and to stay all further proceedings in the suit, on payment of costs.

Both the motions came on this day to be heard. *June 28th.*

The *Solicitor-General* and Mr. *Speed*, in support of the

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motion by the Company for dissolving the injunction, contended, that they had complied with all the provisions of the Lands Clauses Consolidation Act, and were now entitled to possession of the land, and to have the injunction dissolved, and the suit and proceedings stayed.

Mr. *Rolt* and Mr. *Terrell*, contrà, on behalf of the plaintiff, contended, that the Company had, by their first notice under the Act, exhausted their powers, and that they could not give any further notice. On this point the following cases were cited: *Webb* v. *The Manchester and Leeds Railway Company* (*a*), *Maule* v. *Moncrieffe* (*b*), and *Simpson* v. *Lancaster and Carlisle Railway Company* (*c*). That, having once entered into negotiations with the plaintiff, they could not proceed under the 85th section at all; that, if the Court should be of opinion that they were entitled to proceed under that section, they had not complied with the provisions of it, inasmuch as the valuation was dated two days after the deposit in the Bank of the determined value and the delivery of the bond, and that the deposit and bond were consequently informal; and further, that the subsequent proceedings, by which the Company alleged they had set themselves right with respect to possession, were not on the pleadings, or before the Court, or in any manner at issue between the parties; and that it was necessary, before the injunction could be dissolved, that some supplemental proceedings should be taken in the suit.

[In the course of the argument, the counsel for the Company alleged, that the valuation of the surveyor was not in evidence; whereupon the counsel for the plaintiff contended that they were entitled to its production; and his Honor having decided in favour of the plaintiff, it appeared by the date of the bond (as hereinbefore stated), that the

(*a*) Ante Vol. 1, p. 576. (*b*) 5 Bell's App. Ca. 333.
(*c*) Ante, Vol. 4, p. 625.

money had been deposited two days before the date of the valuation.]

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The VICE-CHANCELLOR.—I have no difficulty as to the validity of the bond, and I confess I have felt none also about the right of the Company, acting *bonâ fide*, to come a second time for more land than they demanded at first; but it must not be done capriciously. The Vice-Chancellor of England appears to me to lay down, generally, in the case of *Simpson* v. *The Lancaster and Carlisle Railway Company*, that, giving a notice for land once, for ever exhausts the legal power which the Act of Parliament gives to a Railway Company. Now, the case I was referred to, of *Maule* v. *Moncrieffe*, does not go at all to the point; there was, in that case, power to make a certain dock, and power to deviate to the extent of 100 yards, (that is to say,) to make a given dock at point A. or point B. They made their dock at point A., and they wanted to enlarge it, by taking a part within the limits of deviation; and all that the House of Lords decided was, that, having once made their dock in the way they required, on one part of the land, they could not, upon the ground that they originally had a right to deviate, abandon what they had done, and then say, "We will go on the part within the limits of deviation, and take that which is allowed for deviation," and add it to that which they had previously taken. Two of the Lords who took part in the discussion, Lord *Campbell* and Lord *Brougham*, state their opinion to be, that, having once given the notice, and taken what they wanted, they could not be allowed afterwards to claim more. Lord *Campbell* gives that as his opinion, and Lord *Brougham* assents to it.

Now, I know of nothing more common than that when land is wanted for a cutting, they know the railway at the bottom of the cutting will be of a given width, and they must make the banks to slope, and therefore they take what they suppose the necessary width at the top; but when they come

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to cut, it turns out the soil is of a nature different from what they expected, and, from some cause or other, they cannot make it without inclining the banks more than they contemplated, and then they are obliged to come for a greater width of top, in order to make them slope more. If the opinion of the Vice-Chancellor of England is to be taken as law, the power is exhausted, and the whole railway will be stopped because the Company had not taken enough at first. I was not at all surprised to find a different view taken in that case, in which I was counsel, of *Webb* v. *The Manchester and Leeds Railway Company* (*a*), where that point arose. The Lord Chancellor said, no doubt they may come a second time; and in that case I refer to, before the Vice-Chancellor of England, although the first notice was given for the purpose of the line, and the second for the purpose of the station, I do not find anything to distinguish the two; if it be strictly necessary, in order to make the railway, I have no doubt at all about it, and the Lord Chancellor must alter my judgment upon that point, if it is not right. I am quite clear that the powers given to these Railway Companies are useless to them, if, having narrowed their demand as far as they could, for the purpose of not taking more of a man's property than they wanted, and it turns out it is impossible to complete the railway without taking more, they are not to have the power to take it. That case of *Webb* v. *The Manchester and Leeds Railway Company* is a case in which the Lord Chancellor said they might take more land; and it appears to me, that it is the common case of both parties, that, if they have a right to take, each party may choose the most beneficial mode of taking; the Company say they cannot make their tunnel without blasting; the plaintiff says, "If you make it under my land, you will, in point of fact, destroy my property;" and the Company answer, "If that is the case, we will buy the property of you, and pay you for it."

(*a*) Ante, Vol. 1, p. 576.

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His HONOR then reserved the consideration of the other points, and on the 8th of July he delivered the following judgment:—

I have now to decide those two motions which came on before me in *Stamps* v. *The Birmingham, Wolverhampton, and Stour Valley Railway Company.*

With respect to the first,—that for dissolving the injunction and staying the proceedings,—I regret very much to be obliged to dispose of it upon a very technical ground. Supposing I had the power to make the order on this motion to the full extent, viz. to dissolve the injunction and to stay all further proceedings in the suit, I will not say that I should not, as the case is now before me, have felt fully prepared to do it; but the question is, whether I am at liberty, with regard to the second part of the motion, to stay all proceedings,—whether I have a right to do so now; and, if I cannot, whether I can properly grant the first part of the motion. Now I will first suppose that I cannot stay the proceedings in this stage of the cause. Is it, then, proper for me to dissolve the injunction upon the application now made? If the answer had not been filed, I should have had no doubt whatever that the motion to dissolve the injunction was proper upon the merits, and would properly succeed in this stage of the cause. I take it to be clearly settled, it has been ever since I have known the practice of the Court down to the present time, where there is no answer, and you make a proper application upon affidavit, you have a right to state the facts as they stand at the time the application is made, in the same manner as you state the facts as they exist at the time of filing the answer. Take, for example, the case of a person against whom a bill is filed, and who, before he files his answer, obtains a release from the plaintiff,—there is no doubt, in that case, he may file the answer, stating the fact of the release which existed, although, at the time the bill

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was filed, the plaintiff might have had a good claim. There is a case of *Knight* v. *Matthews* (*a*), where the question was argued, whether the plaintiff had not a right to introduce, by amendment, into the original bill, a fuller statement of facts, which had occurred after bill filed, than was contained in the answer. I think, in that case, it was decided by Sir *Thomas Plumer*, that it was clearly the right of the party to have stated the case as it then stood, by amendment. The difficulty I feel is this: in this case the answer has been filed. Now the matter upon which the defendants seek to have the injunction dissolved, is matter which has happened since the answer. If I can stop the proceedings in the suit altogether, then no harm will be done: for there will then be no further issue to be joined; but if, as I now suppose, I cannot stay the proceedings in the suit, the consequence will be this:—The defendants are in this position: having once filed their answer, they cannot, in the original suit, have the question tried on which their right to dissolve the injunction which has been obtained in that suit depends. If they obtain from the Court, by special favour, leave to file a supplemental answer, or if, as Lord *Redesdale* suggests, the Court may deal with the matter properly after answer, and in discharge of the right of suit, if he should by supplemental bill bring the matter forward, then, in the original supplemental cause, issue must be joined on the point.

This is the way the cause now stands. If I dissolve the injunction on the grounds that have happened since the answer was filed, and I do not stay the proceedings, the plaintiff, as far as I see, may go on with the cause; and, unless a new issue is raised in some way or other, the cause will come to a hearing upon the matters disclosed in the proceedings as they stand; unless by a supplemental bill there can be another suit, or unless by a supplemental answer, filed by the leave of the Court, an issue be joined on

(*a*) 1 Madd. 566.

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the matter which is now relied upon as a ground for dissolving the injunction.

I do not see how I can make the order on this motion; it depends on a matter which is not in issue, and a matter which can never be put in issue, unless by special favour of the Court. The injunction, it is true, is granted until cause is shewn, or until further order. The meaning of that is: until cause is shewn, upon a day to be named, or until further order of the Court to be made before that day. That is the construction I always put upon it. It appears to me there is a real technical difficulty, which I cannot get over unless I am in a condition to grant the second part of the motion, which is to stay all proceedings in the cause."

The question, then, is, whether I can stay all proceedings in the cause. That, I confess, as it appears to me, I am not in a condition to do. The Court, in modern times, has been very much inclined, and usefully inclined, to stay proceedings wherever the defendant comes forward and says, "I will give the plaintiff all he asks by the suit;" that is, all matters in issue in the suit as the cause then stands. The defendant here does not offer to give the plaintiff what he asks. What the plaintiff asks is, to have the property valued, not under the Act of Parliament, but in a different way, to treat with the defendants for the value of the property; but if the defendants, instead of meeting him upon those terms, relies on what is done under the compulsory powers of the Act, the plaintiff in the cause has a right to say he will have the validity of these proceedings tried in the cause. There is no issue at all joined upon that point. I do not see my way to do it, and I refuse the motion, though I think some of the difficulty might have been got over.

With regard to the motion about the sequestration, that stands in a peculiar position. That is a motion, not to commit the contractor or the contractor's workmen, but a proceeding against the Company, by way of sequestration; and it is necessary to see how the case stands against the

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Company. [His Honor then having read and commented on the affidavits, said: That it appeared from them that the Company had, upon the issuing the injunction, ordered the works to be stopped, and it is positively denied that they have ever countermanded that order, or given any authority for recommencing the works. It is also positively denied that the workmen who recommenced the works had intentionally done any act in breach of the injunction. Now, I have no hesitation in saying, that the Company had a right to do whatever they pleased; they had a right to blast, so as they did it in such a manner as not to destroy, weaken, or interfere with the messuages and premises—in the terms of the injunction. Now, the next question is, what is the evidence on the part of the plaintiff as to the damage done? [His Honor then commented on the plaintiff's affidavits, and remarked, that, although it appeared that two or three witnesses had heard several explosions or blastings, none of them, except a lady, who expressed a fear "that the window would have fallen in," apprehended the least danger from what they felt.] His Honor then proceeded as follows:—All this took place on the 12th; no application was made to the parties at Birmingham to desist, or to know what they were doing; but, on the 15th, a notice of motion is given for a sequestration. Now, the obvious course for the plaintiff, when this occurred, was, unless indeed the danger was more urgent, to go to Birmingham, and say you are endangering my house; but, instead of that, without there being any danger to the property, I am, upon this application, called upon to order a sequestration to issue. I confess my opinion is, that no case is made out for so violent a proceeding as a sequestration for contempt against these parties, and this motion must be refused as the other was.

The defendants now renewed their motion to dissolve, by way of appeal to the Lord Chancellor, but his Lordship

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considered that the objection taken by the Court below to the dissolution of the injunction, on the ground that the proceedings of the Company, subsequent to the filing their answer, were not in issue, was well founded, and he allowed the motion to stand over, for the defendants to pursue such course as they might be advised.

August 7th.

The Company now moved for leave to file a supplemental answer, for the purpose of placing the additional facts on the record.

The *Solicitor-General*, Mr. *James Parker*, and Mr. *Speed*, in support of the motion.

Mr. *Rolt* and Mr. *Terrell*, contrà.

The LORD CHANCELLOR.—In some way or other it is clear the defendants must have an opportunity of bringing forward these facts; for it would be productive of great injustice if the Court were bound at the hearing to decide on the facts, not as they actually stood then, but as they stood some time before. The only question is, as to the mode in which that is to be done. The objection, that it is an attempt to alter the issue which has been joined, applies as strongly to bringing forward new facts by supplemental bill as by supplemental answer. On principle it is difficult to see why it may not be done by supplemental answer; for there is no doubt a defendant may introduce in his original answer anything that has happened before putting it in, though subsequently to the filing of the bill. What is the difference when he seeks to do it by supplemental answer? If the defendants in this case could have delayed putting in their answer till these proceedings had been taken, they would have introduced them then; all they ask is to be allowed to supply those facts by supplemental answer. There seems to be an absence of satisfactory authority on this subject, but the only authority there is, is in favour of

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the application. As it is, however, of importance not to interfere with the established practice, I will look into the authorities before I dispose of this case.

On the following day, his Lordship said he had looked at the order made in the case of *Bousfield* v. *Patterson* (*a*), and, although it appeared to have been made upon notice, it did not appear whether it had been argued; however, on the principles stated by him on the day previously, he granted the application.

On this the Company filed a supplemental answer, and renewed their motion for dissolving the injunction and staying proceedings in the suit.

The same counsel argued the case as on the previous hearing of the motion.

The LORD CHANCELLOR.—It does not appear that the Act has expressly laid down any rule at all, but simply that the Company are to give notice of what land they require; in other words, that they cannot take any land without notice. The plaintiff, however, goes further than that; for he contends that the Company are bound to determine, once for all, what quantity of land they will require, and that, when they have taken a certain quantity under one notice, they cannot afterwards, if they find it insufficient, come for more. I am of opinion, however, that nothing could be more inconvenient than to lay down such a rule. The Company is naturally desirous of taking as little land as is necessary for their undertaking, but a thousand unforeseen circumstances may occur in the progress of their works which may make it necessary for them to have more land than they originally calculated on; and, until the works are complete, they cannot be certain whether they may or may not require more land than they at first gave notice for. Of this the case now under consideration is one instance; that of *Webb* v. *The Manchester and*

(*a*) 1 Smith's Practice, 373, 3rd edit.

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Leeds Railway Company (*a*) is another; and it is plain that the effect of laying down such a rule as the plaintiff contends for, would be either to compel these Companies, in all cases, to take more land than they will probably want, or, if they happen to give notice originally for less than they eventually require, to put them at the mercy of the landowner; while, on the other hand, the inconvenience to the landowner from the contrary rule, is comparatively trifling. An argument was, indeed, attempted to be drawn from those cases in which it has been decided, that where a Company has given a notice to take land, they cannot afterwards recede from it; but it does not follow, because the notice constitutes a contract on their part to take the land comprised in it, that, having given notice to purchase one acre, they cannot afterwards give a further notice to purchase another. It is unnecessary to advert to earlier cases, for the question seems to have arisen, under circumstances similar to the present, in *Simpson* v. *The Lancaster and Carlisle Railway Company;* and the Vice-Chancellor of England there laid down what I think is the reasonable rule of construction, assigning the same ground for his opinion that I have done. I quite concur in the view which His Honor took of the subject in that case (*b*); but the present case is a much stronger one, for there the purpose for which the additional land was wanted was a station, the building of which in that particular spot might have been more or less convenient for the traffic of the Company; whilst here, the possession of the land in question is absolutely indispensable to the completion of the railway. This construction of the Act is more consistent than the other, whatever may be presumed to have been the intention of the legislature, for it is that which the interest of these

(*a*) Ante, Vol. 1, p. 576.

(*b*) Ante, Vol. 4, p. 625. The Lord Chancellor seems to refer only to the decree in this case, which was made on the special ground that the land required was for *a station*, and not to the dictum of the Vice-Chancellor of England, (p. 634), by which he restricts the right of a Company to one notice for taking land *generally*.

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Companies requires, and which does not expose landowners to anything like the inconvenience to which the contrary construction would subject the Companies. I think the Act is not only capable of such a construction, but that it is the right and proper one; and, therefore, as the Company have now taken all the steps which the Act prescribes for acquiring possession of this new land, the ground on which the injunction was originally granted has ceased to exist, and the injunction must be dissolved.

As to costs, it is not now in dispute that the injunction was originally correct, and the defendants have only got rid of it by subsequent acts; therefore, as the Vice-Chancellor refused to dissolve the motion with costs, and I agree with his view, I leave that order as it stands. As to the present motion, there has undoubtedly been an attempt to put the Company into a position in which they would be unable to go on under the powers of their Act; but, as they have acquiesced in what was intimated in the course of the discussion, that they could not go on with the motion as the pleadings then stood, they must pay the costs of the appeal motion.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE LORD CHANCELLOR.

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Jan. 22*nd* & *March* 24*th*.

A Railway and Canal Company were formed by the union of several ancient Canal and three Railway Companies, and power was given to the united Companies to issue new shares, for the purpose of raising capital. A large debt was due before the Act of union from one of the Canal Companies, and, in pursuance of a resolution passed at a general meeting, a call was made on the shareholders of the united Companies for the purpose of paying it off. Some of the shareholders in the new Company objecting to this application of the monies to be raised under the new Act, and alleging that it would prevent the construction of the railway at all, filed a bill for an injunction to restrain the directors from enforcing a call or applying any of the funds in their hands for the purpose of paying the debt.—A demurrer for want of equity allowed.

COOPER *v.* THE SHROPSHIRE UNION RAILWAY AND CANAL COMPANY.

THE bill in this case was filed by J. Cooper, one of the shareholders in the Shropshire Union Railway and Canal Company, on behalf of himself and all other shareholders,

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against the said Railway and Canal Company, and the directors, stating (amongst other things,) that, by an Act, (7 & 8 Geo. 4 c. cii,) certain persons, proprietors of the Ellesmere and Chester Canal Navigation, by virtue of several Acts therein recited, were united into a Company, and made one body politic and corporate, by the title of "The United Company of Proprietors of the Ellesmere and Chester Canal;" and afterwards, by an Act (8 & 9 Vict. c. ii), the Birmingham and Liverpool Junction Canal Navigation Company were united with the Ellesmere and Chester Canal Company; and it was declared (sect. 8), that all mortgages and other securities already created and which might thereafter be created relating to the Ellesmere and Chester Canal, and all debts due by the united Company, should be a charge on the works and property of the united Company, in preference to the mortgages, bonds, and other securities created under the authority of the Acts relating to the Birmingham and Liverpool Junction Canal Navigation; and all debts which, at the time of the passing of the Act, were due by that Company, should be a charge on the works and property of the Birmingham and Liverpool Company, before and in preference to any securities created by Acts relating to the Ellesmere and Chester Canal Company. That, under the powers of their Act, the Birmingham and Liverpool Company had borrowed from the Public Works Loans Commissioners 291,719*l.*, part of which having been paid off on an assignment of the debt and interest to the Corporation of the Royal Exchange Assurance Loan Company, the sum of 39,186*l.* remained due to the Loan Commissioners, being secured by the personal bond of the directors and of certain proprietors in the undertaking; and the same was charged generally on the property and effects of the united Company, in the same manner as the original sum lent to the Birmingham and Liverpool Company, except that it was postponed to the securities for the repayment of 252,533*l.* due to the Royal Exchange Corporation.

By the Act of union of the Ellesmere and Chester Canal

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Companies, they were empowered to raise 330,000*l.* by shares, and it was declared that the holders of such shares should be entitled to dividends in preference to any existing shares, or upon the sum which had been raised by calls; and it was provided that the monies received on account of the preference shares should be applied in or towards payment of the sum due to the Exchange Assurance Corporation, and of sums due to landowners whose claims had not been satisfied; and that the surplus, if any, should be applied in discharge of any debt of the United Company, or as part of their annual income.

No preference shares were ever issued, but the sum of 39,185*l.* was divided among the several persons who had executed the bond to the Loan Commissioners, by charges upon the Ellesmere and Chester Canals, each for 675*l.* payable in 1849.

In 1846, three several Acts of Parliament received the royal assent (*a*), with each of which the United Ellesmere and Chester Canal Companies were incorporated under the name of the "Shropshire Union Railways and Canal Company." The first of such Acts was for the making a railway from Shrewsbury to Stafford; under which Act, the Company had power to issue new shares for raising 800,000*l.*, to be divided into shares of 20*l.* each, which were to be considered as the general capital of the Company. The second Act was for the formation of a line from Newtown to Crewe, with branches, and in which the Company had power to issue new shares of 20*l.* each, for raising, in like manner, 1,500,000*l.* The third Act was for the formation of a line from Calveley to Wolverhampton, under which the Company had power to issue new shares of 20*l.* each, for raising 1,000,000*l.*

And it was, by each of the said Acts, declared that the monies to be raised should be in addition to any monies the Company were then authorised to raise; and that all

(*a*) 9 & 10 Vict. c. cccxxiii, c. ccxxiv, c. cccxxii.

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mortgages of the Ellesmere and Chester United Company and the Shrewsbury Canal Navigation (therewith also incorporated), should be made mortgages of the same amount of the Shropshire Union Railways and Canal Company.

By the first Act, it was declared that the monies to be raised by new shares should be appropriated to a fund for the construction of the railway and works thereby authorised, and for the purposes connected therewith.

By the second and third Acts, it was provided, that the monies to be raised by the creation of new shares were to form part of the general capital of the Company.

In 1847, an Act (11 & 12 Vict. c. cxxi) passed, whereby it was enacted, that, on the completion of the works of the railways by the therein recited and hereinbefore mentioned Acts authorised to be made, so as to be opened for public traffic, or at such earlier period as might be agreed upon between the Companies, the Shropshire Company were empowered and required to grant, and the North Western to accept a lease in perpetuity on the terms therein mentioned.

On the 14th of October, 1848, a letter was sent to the plaintiff, making a second call of 1*l.* per share, making 5*l.* paid up on each 20*l.* share in respect of seventy-three shares, of which he was the holder.

At the foot of the letter was the following note:—N. B. —"The above call has been made to meet the payment of mortgages at 5*l.* per cent."

It was alleged by the bill, that this call had been made to meet the mortgages on the Ellesmere and Chester Canal, which were then vested in the Royal Exchange Assurance Company, and would become due on the 30th of January, 1849.

That no monies had been raised or were authorised to to be paid on bonds or mortgages under any of the three Acts of the Shropshire Union Railways.

That the only works commenced were on a portion of the line to be made under the Shrewsbury and Stafford Act, and the directors had declared that they did not in-

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tend to proceed with any of the works authorised to be constructed under either of the other Acts.

That the paid-up deposit and call on 165,000 shares ought to have produced 660,000*l.*, and that the directors had in June then last a balance of more than 200,000*l.*, and that that balance, with the produce of the 1*l.* call, would be more than sufficient for the construction of the portion of the railway, which was then alone to be constructed.

That, until the railway was completed, the lease to the North Western could not be made, and that the directors ought to apply all monies which they were empowered to raise by calls on new shares in the construction of the railway.

That no part of the Ellesmere and Chester Canal had been stopped up nor the use thereof discontinued.

The bill, after charging that many of the new 20*l.* shareholders concurred with the plaintiff, and that he could not ascertain the names of those who did not concur, and that, if they were made parties, it would be impossible to prosecute the suit to a hearing, prayed, that it might be declared that the directors had no power to make the call of 1*l.* per share for the purpose stated in the letter received by the plaintiff; and that the Company and directors might be restrained by injunction from enforcing payment of such call, and from declaring any shares forfeited for non-payment, and from applying any of the monies then in their custody, which had been contributed by the holders of new shares, towards the discharge of any debts and liabilities of the Company upon mortgage, bond, or otherwise, which had been created prior to the Shropshire Union Act, 1846.

To this bill the defendants demurred generally, for want of equity.

Mr. *Bacon* and Mr. *Speed*, in support of the demurrer, contended, that the payment of the existing charges on that which was now the property of the united Company was a legal and proper application of the sums raised, and

they were authorised in making the present call upon the shareholders. If what the defendants were doing was a legal exercise of their power, then the Court would not interfere because some of the shareholders objected: *Foss* v. *Harbottle* (*a*), *Mozley* v. *Alston* (*b*), *Exeter and Crediton Railway* v. *Buller* (*c*), *Lord* v. *The Copper Miners' Company* (*d*).

Mr. *Russell*, Mr. *Malins*, and Mr. *Westoby*, contrà, contended, that the sums authorised to be raised by the creation of new shares were solely for the purpose of the Act, viz. the construction of a railway. That the existing charges on the canal were secured on the same property and in the same manner as when they were created. That, in estimating the cost of making the railway, these incumbrances had not been taken into consideration, and were supposed to be sufficiently secured; and that, if the monies raised by calls on the new shares were now applied in paying off those incumbrances, there would be nothing left to form the railway, which was the object of the enactment. That powers existed under the Canal Acts, whereby they might raise sufficient to pay off the debts due by the canal without defeating at once the object of the Act and the intention of the shareholders.

The VICE-CHANCELLOR in the course of the argument observed: The facts appear to me to be, that certain then existing corporations were extinguished, and a new corporation formed, consisting of new members and of members of the extinguished corporations. The old and new members were made members of the new corporation, and the debts of the extinguished corporations were made debts of the new corporation. This appears to me to be a debt in respect of which the Company may be sued at law, and there appears to me no reason why it should not be paid.

His HONOR, without hearing a reply, in delivering judgment, said,—Independently of the cases of *Foss* v. *Harbottle*

(*a*) 2 Hare, 461.
(*b*) Ante, Vol. 4, p. 636.
(*c*) Ante, Vol. 5, p. 211.
(*d*) 2 Ph. 740.

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Mozley v. *Alston*, *The Exeter and Crediton Railway* v. *Buller*, and *Lord* v. *The Copper Miners' Company*,—the doctrines in each and all of which cases I am not prepared to decide are judicially sound, however, I may be at least justified in acting upon them, if I am not absolutely bound by them—I cannot overrule this demurrer. If I were to overrule it, I think I should be acting against some portion, at least, of each case, and I therefore decline doing so; and not the less readily, because the inclination of my opinion is, that, were the authorities to which I have referred out of the way, I should decide the question of equity before me against the plaintiffs. I must, therefore, allow the demurrer, with costs.

From this judgment the plaintiffs appealed.

Mr. *Malins* and Mr. *Westoby*, for the plaintiffs.

The LORD CHANCELLOR, (without hearing the other side.)—In the course of Mr. *Malins'* argument, the Vice-Chancellor *Knight Bruce* must be considered as having decided this case upon the construction of the Acts; and he was disposed to disregard the authorities mentioned in his judgment as having no application. The present case does not appear to me to have reference to those authorities. Here the plaintiff complains that the Company are trying to use the powers of their Act for a purpose not thereby authorised. But is it not merely paying for that upon which the railway is to be constructed? If you buy land or buy a canal it is part of the matter which you purchase in order to make the railway. Suppose this canal property had not been subject to any mortgage, the Railway Company would have had to pay much more money for it. The 24th section of the 9 & 10 Vict. c. cccxxii, enacts, that "all mortgages, bonds, and other securities, charges, and incumbrances on such parts of the Ellesmere and Chester Canal as are proposed to be stopped up and discontinued under the powers of this Act, and the tolls and duties arising therefrom, shall remain mortgages,

&c. on all such parts of the said Ellesmere and Chester Canal as are now charged therewith and shall not be so stopped up and discontinued, and shall become and be made also mortgages, bonds, or securities, charges, or incumbrances on the railway hereby authorised to be constructed, and the tolls to arise thereon; and shall confer on mortgagees, &c. similar rights of preference or priority of payment among themselves to those which they at present enjoy, and shall also confer upon such mortgagees, or other persons, a priority in point of lien over all other mortgages to be granted by this Act, and a right to be fully paid and satisfied the several sums secured by the said mortgages, &c., and all interest for the same, before the other persons to whom mortgages may be granted under this Act, shall be entitled to receive any part of the sums to be secured by their mortgages, or any interest for the same."

It has been argued, that that applies only to so much of the canal as should be stopped up, and a railway substituted in its place, but I do not find anything to limit the right of the mortgagee to the railway, whether it be that portion of it which runs upon the ground previously occupied by the canal or not; the enactment is a species of general charge not confining the remedy to those parts only which are stopped; but the charge is to remain of course, whether the canal ceases to be a canal, and becomes a railway or not. It is a charge both on the canal and on the railway proposed to be made.

Mr. *Malins* submitted, that although the mortgages might be charges on the railway when made, they were not mortgages on the calls with which the money was to be raised for making the railway.

The LORD CHANCELLOR.—The 25th section provides for notice being given to the mortgagees and for payment of all their incumbrances before the canal or any part of it be stop-

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ped up, if they require it. How is this to be done, if your construction is right? The money to be produced by the calls in question is applicable to the discharge of the incumbrances upon that which is the railway; and all the charges on the canal are admitted to be charges on the railway, a part of which has been made, and, being so, it is the right of the Company to pay off the charges on that property. I do not find in any of the clauses to which I have referred, for raising money in various ways by mortgage or by the creation of new shares, that any of them specify the purposes to which the particular funds are to be applied.

Mr. *Malins*.—In the 52nd section of the Shrewsbury and Stafford Act it is provided, "that the monies to be raised by the creation of such shares of the nominal value of 20*l.* each, and by mortgage, shall be appropriated and applied as a fund for the construction of the railway and works hereby authorised, and for purposes connected therewith."

The LORD CHANCELLOR.—Yes, but that is not to be confined to the earth works, but extends to everything necessary for the formation of the railway. Suppose it to be applied to the purchase of land for the formation of the railway, that would be a proper application; but what is now proposed to be done is not to pay for the land, but to pay off the incumbrances upon the land so bought: if you purchase a piece of land subject to a mortgage, and you do not pay off that mortgage at the time, but pay it off afterwards, it cannot be pretended that that is not a proper application. I cannot see, (though one cannot be very sure where there are so many clauses of so many Acts), how these incumbrances are to be paid off, if these funds are not to be applied for that purpose. They are just the same as the other funds to be raised; it is an application of that money which is described in the Act of Parliament as three funds constituting the capital of the new Com-

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pany, the railway being substituted for the Canal Company. Various modes of paying the debt are laid down; but as I construe the 52nd section, it makes no difference at all by which it is to be done.

The question is, whether, after the money has been raised upon the calls, this is a misapplication by the Company of the funds so raised. It appears to me to be neither more nor less than paying off an incumbrance upon the property which has become theirs by the operation of these Acts, and is to be made applicable to this scheme. As I apprehend it, the bill does not represent any misapplication, consequently a demurrer may be sustained. The Vice-Chancellor disclaims the authorities as the ground upon which he decided this case, and in affirming his decision I do it entirely on the construction of the Acts of Parliament. I do not interfere in the slightest degree with the propriety of the decisions to which he refers, and which I hope, when they come before him, he will see good reason for following.

Appeal dismissed, with costs.

BEFORE THE LORD CHANCELLOR.

Ex parte HALL (*a*).

(*Winding-up Act*, 1848).

Nov. 7th, 8th, 9th, & 10th.

M. O., on her second marriage, assigned certain shares to B., a trustee, for her separate use.

THE facts on which the judgment of the Lord Chancellor is founded, are stated ante, vol. 5, p. 624, and in the body of his Lordship's judgment.

B. made a verbal communication to the clerk of the Company, of the execution of the settlement, but no transfer or registration of the shares into B.'s name was made, and they continued in the name of the original holder. B. received the dividends, but there was nothing to shew that he received them in character of assignee of the shares. The Master had placed B.'s name on the list of contributories, and the Vice-Chancellor *Knight Bruce* refused to strike it out:—The Lord Chancellor dissented from the decision of the Court below, that B. was rightly placed on the list of contributories, and gave leave to the respondent to try the question of B.'s liability by an action at law. The Court of Chancery will not direct an issue when the question of right can be tried by action.

(*a*) This case, when before *Knight Bruce*, V. C., is reported ante, Vol. 5, p. 624.

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The petition was argued by the same counsel as in the Court below.

The LORD CHANCELLOR.—I felt perfectly satisfied, from what passed yesterday, that I could not satisfactorily dispose of this case upon the evidence before me, and therefore I offered the respondent's counsel an opportunity of proceeding to establish, if he could, his claim at law; this was declined, and therefore I must dispose of it upon my own view of the evidence before me. Now, nothing is more simple than the facts of this case, and nothing, as it appears to me, more simple than the law as applicable to those facts. Here a lady who held certain shares, as representative of her husband, being about to marry again, assigns those shares to a trustee for her, that is, she executed a deed, professing to assign her interest in those shares, and from that act the conclusion is drawn, that there was an actual transfer. Now transfer there is not, but there is an assignment of her interest therein by deed, and this gentleman, who came forward merely to protect the interest of this lady as trustee under her marriage settlement, is attempted to be made a contributory, and liable personally to all the debts of the concern. It would be a hard case if a party thus acting were to find himself involved in all the liabilities of a bankrupt speculation, which may involve the amount of millions. However, if such is the law, that that burden must be thrown upon him, it is a hardship he must endure; but to me it is a matter of extreme anxiety to see, before I impose upon a person that responsibility, that the facts of the case clearly justify me in doing so. Now no one can doubt the utility of the Winding-up Act, but it is of vital importance to parties, whether they are to be held liable as contributories; and I have no more right to deal lightly with the claim against a party as contributory, than I should have, in trying a case at Nisi Prius, to direct the jury to find for the plaintiff before the case is

proved against the defendant; for it is nothing more or less than trying his liability to an indefinite amount. Now, whether the ground of liability be called legal or equitable, it makes no distinction, because what I have to decide in this case is, whether there is anything to make him legally liable to the creditors of the concern. I will state shortly what there is in the evidence before me, to shew that he had in any manner made himself a shareholder in this concern. It appears by his own statement, in answer to an affidavit swearing that he had communicated the fact of the assignment to some officer of the Company, that the communication was made, not for the purpose of being a shareholder in the concern, but simply for the purpose of cautioning the Company against the payment of the dividends to the party to whom they might otherwise have been paid. The fact of the verbal communication was sworn to by one of the clerks of the concern; and Hall admits that he did make it, but that he made it for that purpose only.

From the time of that communication the dividends were received by him, but the shares were never transferred, and they continued to stand in the name of the original owner. Hall received the dividends, but there is nothing to shew that he received them, or applied for them, or that they were paid to him in his character of assignee of the shares. Some of the receipts are on behalf of the personal representatives, some by procuration, and there is not one in which he purports to receive the dividends as assignee or owner of the shares, except in one instance, where, after the simple signature of his name, some third person has written the word "trustee." He denies that that was done by himself or that he had any knowledge of it, and there is nothing to lead to the suspicion that it was done by him, or with his knowledge. The evidence is, that it was done by a clerk of the Company; and except these two facts there is nothing whatever

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to connect him with the Company, or to shew that he ever intended to become a member of the Company, or that the Company ever looked upon him as a member. In both cases means are provided by which that is to be done. In the case of an assignment, and the assignee not taking the proper steps subsequently to become a member, the deed of settlement provides, that after six months the shares are to be forfeited. So again, if, being assignee, he is desirous of becoming a member, he has certain means of bringing it under the consideration of the directors, whether they will receive him as a member or not. Now neither of those steps is taken, either by the Company or by the person to whom the shares are assigned; but the whole that appears to have taken place, was the transaction to which I have referred. The Master, on these grounds, has held him to be a contributory, and therefore liable to contribute, in proportion to these shares, to all the liabilities of the Company. The Vice-Chancellor *Knight Bruce* has concurred in that opinion. Supposing an action were tried, legally raising the question of liability to the debts and obligations of the Company, is there the least chance, independently of the technical difficulties that surround this Act, of any jury coming to the conclusion that he was liable? I should not speak so strongly as to the probable results of an action, were I not supposing an action where this evidence, and this evidence only, would be presented to the jury. If I am to deal with the question, I must deal with it upon the evidence before me; and I must make such observations as strike me to be proper, to guide and regulate the conclusion to which I have come. If the respondent still wishes to have an opportunity of trying the question at law, I will not consider him as barred by his having previously declined that offer.

Mr. *Bacon*, after referring to the difficulties that stood in his client's way of trying the question at law, by reason of the previous decisions of Courts of law, under the Joint-stock

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Companies Act (*Ness* v. *Angas*(*a*), *Ness* v. *Armstrong* (*b*)), asked time to consider whether he would accept the offer.

LORD CHANCELLOR.—I think it right to give you that opportunity. The question is, Whether the party is a contributory? As to that, I have my instructions from the Act of Parliament, which I cannot go out of, which says, "the word 'contributory' shall include every member of a Company," which this party clearly is not; and also, "every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a former member of the same, deceased or otherwise howsoever." The question, therefore, before me is, whether this party is proved before me to be liable in any character to contribute to the losses of the concern—that is, liable independently of this Act? A party cannot complain when such a definition is referred to by the Act, as to the party who is to be the contributor. It gives him the opportunity of shewing, that the party sought to be fixed as a contributory is so liable. I am of opinion, that the evidence before me does not shew such a liability; and I am only adopting the ordinary course in saying, that, though it is not proved here, I will give the party an opportunity of proving at law the legal liability. I will not make a final order until I know whether the party will avail himself of that opportunity.

Nov. 10*th.*

Mr. *Bacon* asked that the case might be sent to law in the shape of an issue; but the Lord Chancellor said, that the Court never directed an issue where, as in the present case, an action would try the question. The motion might stand over, with liberty to the official manager to take such proceedings at law as he might be advised; and that Hall's name should not be struck out of the list of contributories until the question was decided; but no step must be taken against him as contributory in the mean time.

(*a*) 18 L. J., N. S., 470. (*b*) 1 Bing. 473.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

Nov. 16*th.*

Ex parte SMITH, *Re* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

On petition for investment of purchase-money in Court under the 80th section of the Lands Clauses Consolidation Act, a Railway Company is not bound to pay the costs of the appearance of persons holding mortgages on a life estate in the land purchased.

THE petition in this case was presented by the tenant for life of certain land at Dewsbury Moor, in Yorkshire, sold by him under the enabling clauses of the Lands Clauses Consolidation Act, to the above-named railway, praying the investment of the purchase-money and payment of the dividends to the petitioner for life; and that the costs, charges, and expenses might be paid by the Railway Company. The life estate of the petitioner had been mortgaged by him, and it had been found necessary to serve the mortgagees with a copy of the petition, and they now appeared to consent to the prayer of the petition, and asked that the Railway Company might be ordered to pay their costs.

Mr. *M. A. Shee* appeared in support of the petition.

Mr. *Bacon*, for the Railway Company, objected to the payment of the costs of the mortgagees.

The VICE-CHANCELLOR, however, was of opinion, that the costs of the mortgagees were not such costs as were provided for by the terms of the 80th section of the Lands Clauses Act, and refused to make the order for payment of them by the Railway Company.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

Ex parte THE SOUTH WALES RAILWAY COMPANY. *March 13th.*

Where a Railway Company had paid the estimated value of a piece of land into Court, under the 85th section of the Lands Clauses Consolidation Act, and afterwards concluded the purchase by contract, the Court will not order the payment out to the Company of the sum deposited, unless the vendor join in the petition, or a copy of it be served upon him.

THIS was a petition by the above-named Company, praying that a sum of 5000*l.*, which had been paid into Court under the 85th section of the Lands Clauses Consolidation Act, as the estimated value of a piece of land entered upon by the Company, might be paid out to them.

The petition stated, that the Company had come to an agreement with the owner as to the price to be paid for the land, and that he had received his purchase-money and executed a conveyance to the Company.

On the 1st of March, his Honor made the order, upon production of an affidavit that the purchase-money and costs had been paid.

The registrar refused to draw up this order, upon the ground that the vendor had not been served with the petition.

The petition came on again to be mentioned this day, and Mr. *Bourdillon*, for the petitioners, contended, that, upon the authority of *Ex parte The Eastern Counties Railway Company* (*a*), it was unnecessary to serve the vendor; and that, upon the production of the affidavit above stated, the registrar of the Court ought to have passed the order.

His Honor, however, after consulting with Mr. *Colville*, jun., the registrar, said that, as the money was paid in for the protection of the vendor, the order ought not to be made, without either serving the vendor with the petition or making him a co-petitioner with the Company.

(*a*) 5 Railw. Cas. 210.

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March 5th, 6th, & 28th.

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Feb. 9th.

BEFORE VICE-CHANCELLOR WIGRAM AND THE LORD CHANCELLOR.

BAGSHAWE *v.* THE EASTERN UNION RAILWAY COMPANY.

By certain Acts of Parliament, the South Eastern Union Company were empowered to purchase a branch line to A., and to construct another to B., and by each of the same Acts a power was given to raise a sum of money for the respective purposes of the Act, to be divided into scrip shares, and to be considered as the general capital of the Company. At a meeting of the shareholders it was resolved, that the sums should be raised for the purposes of the two Acts; and scrip certificates, intitled under the said Acts, were issued. The plaintiff purchased two scrip certificates from an original subscriber, and was registered in respect of one such certificate, but not in respect of the other.

THE bill in this cause was filed on the 29th December, 1848, by John Bagshawe, the proprietor of two scrip certificates, for perpetual 6*l.* per cent. stock in the Eastern Union Railway Company, on behalf of himself and all other the proprietors of such scrip certificates other than and except the eighteen defendants thereto (being the directors of the said Company), against the said eighteen directors and the Company, praying a declaration, that a certain resolution of a general meeting of the Company, held in August, 1847, was valid and binding on the Company, and the directors thereof, as a contract between them and the proprietors of the said scrip certificates and 6*l.* per cent. perpetual stock, as to the application of such new capital; and that an account might be taken of the monies received by the defendants under the powers of the Eastern Union and Harwich Railway and Pier Act, and the Eastern Union and Hadleigh Junction Railway Sale Act, 1847, or either of them, and of the application of such monies. And if it should appear that the directors had applied any portion of the said monies to any other purposes than those specified in the said Acts, then that it might be declared that they had committed a breach of

The Company were about to apply the monies raised by the new scrip in completion of part of the old line, when the plaintiff filed his bill against the directors and the Company, praying the application of the monies to the particular purposes of the two branch Acts. To this bill the directors and the Company demurred:—*Held*, by the Lord Chancellor, affirming the decision of Vice-Chancellor *Wigram*, overruling the demurrers, that the plaintiff had an equitable right to the relief prayed, and that such relief was the right of each member, even against the majority of the shareholders.

That the interest of a holder of registered and unregistered scrip was not so conflicting as to disentitle him to relief.

That the acts of the directors of the Company must be taken to have been so far the acts of the Company in its corporate character, as that the Company were properly made defendants to the bill

That the original subscriber for the scrip shares was not a necessary party to the suit.

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trust in so doing, and that they might be decreed personally to replace to the credit of the Company the sums which should appear to have been so misapplied; and praying a declaration, that it would be a breach of trust on the part of the directors to apply any portion of the monies received or to be received under the powers of the said two Acts, or either of them, to any other purposes than those specified in the said Acts respectively; and the bill asked an injunction to restrain the directors from applying any portion of such monies to any purpose other than the purposes so specified.

To this bill the Company, and also the directors individually, demurred for want of equity.

The facts were as follow:—

By an Act of Parliament (7 & 8 Vict. c. lxxxv), the Eastern Union Company were incorporated, and the usual powers were given for making a railway from Colchester to Ipswich, and for raising a capital of 200,000*l.* for that purpose. The Company were also empowered to borrow 66,666*l.* by creating new shares; and by another Act (8 & 9 Vict. c. xciv), they were further empowered to raise 50,000*l.*; and the capital so to be raised was to be considered as part of the general capital of the Company, as if it had been part of the original capital, except as to the amount of shares, &c.; and the Company were also empowered to raise 16,666*l.* by mortgage or bond, with power to convert the loan into capital.

By a certain other Act (10 & 11 Vict. c. clxxiv), the Company incorporated for the construction of the "Ipswich and Bury St. Edmund's Railway to Norwich, with a branch therefrom," and the Eastern Union Railway Company, were united and incorporated into one Company, by the name of The Eastern Union Railway Company; and under the same Act, a power was given to the united Company to borrow further sums on mortgage, not exceeding in the whole one-third of the capital of the Company.

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In 1847 an Act (10 & 11 Vict. c. xix) was passed for authorising the sale of the Eastern Union and Hadleigh Junction Railway to the Eastern Union Railway Company, and the Eastern Union Railway Company were by the same Act empowered to create an additional number of shares, and to borrow monies not exceeding 100,000*l.* for the purchase and completion of the Hadleigh Junction Railway.

In the same year another Act was passed to empower the Eastern Union Railway Company to make a railway from Manningtree, a place on their line, to Harwich, with brances thereout, and for other purposes; and it was by the same Act recited, that it would be attended with much public advantage if a railway were made from the line of the Eastern Union Railway in the parish of Lawford to Harwich, with two small branches therefrom, and also if a pier or jetty were made at the latter place in connexion with the proposed railway, and that the Eastern Union Company were willing to carry those objects into effect; and by the 4th section of the same Act it was enacted, that it should be lawful for the East Union Railway Company to raise "for the purposes of this Act," in addition to the capital before authorised to be raised, and in addition to any other sum which the Company might be authorised to raise by any Act to be passed in the then session of Parliament, a further sum of money not exceeding 200,000*l.*, such capital thereby authorised to be raised to be considered as part of the general capital of the Company, and to be subject to the same provisions in all respects, whether with reference to the payment or non-payment of calls, or forfeiture of shares for non-payment as if it had been part of the original capital, except as to the amount of the shares, the times of making the calls, and the amount of the calls (*a*).

(*a*) The other material clauses of this Act are set out in his Lordship's judgment, post, p. 172.

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At a general meeting of the Company, held on the 21st August, 1847, shortly after the passing of the two last mentioned Acts, a report was submitted to the shareholders, declaratory of the great advantages likely to accrue to the Company by the objects of the two Acts being accomplished, and urging on them the immediate necessity of raising 300,000*l.* for those purposes; and the chairman of the meeting proposed the following resolution, which was carried unanimously: "That, for the purpose of constructing the branch line from Manningtree to Harwich, and for purchasing the Hadleigh Railway, under the two Acts passed in the last session of Parliament, the directors be authorised to raise, between the date hereof and the 1st of January, 1849, the sum of 200,000*l.* and 100,000*l.*, and to grant scrip receipts for such amount as may from time to time be paid up in respect of such sums, until each subscriber of 20*l.* and upwards shall have paid the amount he may subscribe in full; and such scrip receipts shall entitle the holder thereof, on the 1st of January, 1849, to become a registered shareholder in a new Eastern Union Stock for the amount he has subscribed and paid up, upon which he shall receive a guaranteed dividend of 6*l.* per cent. per annum in perpetuity, and have the option, at the end of any six months within five years, of converting his guaranteed stock into the general stock of the Company; that, to comply with the fourth article of the terms of amalgamation between the Eastern Union and Ipswich and Bury Companies, the directors shall, by means of a circular to be addressed to the original shareholders of the guaranteed 5*l.* per cent. and general extension scrip of the Ipswich and Bury Company, offer, until the 31st of October next, to receive such sums exclusively from the present holders (as they can be ascertained) of the above extension of scrip shares; and that each holder of an extension scrip share of 5*l.*, on which 2*l.* 10*s.* has been already paid, shall be entitled to 20*l.* of such guaranteed stock, on making application to that effect, with an undertaking to pay the remaining 17*l.* 10*s.* before

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the 1st day of January, 1849, at such stated periods as shall be satisfactory to the directors; and that, on all prepayments discount be allowed to the 1st of January, 1849, at the same rate of interest as is allowed in perpetuity on the new stock. That, in case any holder or proprietor of such Ipswich and Bury extension scrip shall refuse or neglect, before the 31st of October, 1847, to accept stock in accordance with the terms of the offer, or, having accepted the same, shall fail to pay up the sum of 17*l.* 10*s.* in respect of every 20*l.* thereof, on or before the 1st of January, 1849, the same shall be allotted by the directors to such persons and in such manner as they may think fit, and with or without the like advantages as to interest, by way of discount and dividend, as above provided."

The bill stated, that, in consequence of the said resolution, scrip certificates had been issued, and the whole of the sum of 300,000*l.* subscribed for, and that all the calls had been paid previous to the 2nd June, 1848, except the sum of 85,000*l.*, which sum fell due, and ought to have been paid on or before the 31st December, 1848.

In January, 1848, the plaintiff J. Bagshawe purchased two scrip certificates numbered respectively 982 and 983, which were duly signed by the secretary of the Company.

The certificates were in the following form: "Scrip for Eastern Union—Perpetual 6*l.* per Cent. Stock, 1849, with the instalments in course of payment. Eastern Union Acts, Eastern Union and Harwich Railway and Pier Act, Eastern Union and Hadleigh Junction Railway Act, 1844, 1845, 1846, and 1847. Stock 500*l.* The holder of this certificate having paid 250*l.* to the Eastern Union Railway Company, and having engaged to make further payment of 250*l.* on the 31st of December, 1848, under allowance of discount from day of payment to 1st January, 1849, at the rate of 6*l.* per cent. per annum to any of the bankers hereinafter mentioned, viz. Messrs. Glynn & Co., and others, will be entitled to 500*l.* stock of the said Company, and to be registered as proprietor thereof, on fulfilment of such obliga-

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tions; such stock to bear interest at the rate of 6*l.* per cent. per annum in perpetuity from the 1st of January, 1844, with an option to the proprietors, at any time during five years from that day, to surrender such guaranteed stock of the Amalgamated Eastern Union and Ipswich and Bury Company, and such dividends, as such general stock may be entitled to thereafter, as the above payments are equally binding upon the present holder and his assignees if parted with. A condition hereof is, that in case of failure of any one of the above payments for thirty days after the same is payable, the holder shall forfeit his right to a guaranteed interest, and be entitled to participate only in dividends upon such money as he shall have paid up, at such rate as shall be declared subsequent to the 1st of January, 1849, upon the general stock of the Company." The bill stated, that the persons who subscribed for the said 300,000*l.* did so, confiding in the said resolutions and in the representations of the Chairman at the said meeting, and of the other directors, as to the purposes for which the said perpetual 6*l.* per cent. stock was to be created, and not supposing that the money to be raised thereby would be applied to any other purposes than those connected with the construction of the said line to Harwich, and the purchase of the said line from Hadleigh.

That, on the 13th of June, 1848, the plaintiff was the acknowledged proprietor of the said two scrip certificates, and having, on the 27th of December following, paid the last call on one of such certificates in advance, he claimed to be registered in respect of the shares which such certificate represented. To this application the secretary sent the following answer:—"I have received a scrip certificate of twenty-five shares, 6*l.* per cent., to be registered in the name of John Bagshawe, Esq., of &c., and for which purpose a new certificate shall be forwarded to your address."

The bill stated that the said certificates had been registered in the plaintiff's name, or ought to have been regis-

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tered, and that, if they had not been so registered, it was through the default of the defendants. The bill further stated, that the plaintiff had, until within a few days, believed that the Company intended to proceed with the construction of the railway from Manningtree to Harwich, but that he had since been informed that all negotiations for land on that line had been postponed indefinitely, and "that he had discovered, as the fact is," that the directors had resolved not to proceed with the construction of the said railway; that a further delay in the commencement of the works thereon would occasion irreparable loss to the plaintiff and the other persons desirous of having the same completed, inasmuch as the unexpired time during which the Company's powers would continue was not more than sufficient for such completion.

The bill further alleged, that a majority of the directors of the Company had a strong personal interest, distinct from the interest of the Company, in completing the Eastern Union Railway to the city of Norwich, and were totally indifferent about the completion of the line to Harwich; and that, finding themselves unable to raise sufficient capital for both purposes, they had determined to misapply, and had already, to a great extent, misapplied the money raised under the said Eastern Union and Harwich Union and Pier Act, 1847, and under the said Eastern Union and Hadleigh Junction Railway Sale Act, 1847, by employing the same in constructing an extension line to Norwich, and for other purposes not authorised by the said Acts, or either of them; that such application was not only contrary to the directions of the said Acts of Parliament, but also contrary to the said resolution passed at the said meeting, on the 21st August, 1847, and that it was not within the powers of the said Corporation or Company, or of any majority of the members thereof, to authorise or sanction such application; and that, by the Companies Clauses Consolidation Act, the plaintiff was disabled from calling a meeting of the said Company, without giving

thirty-five days' notice thereof; that the said directors of the said Eastern Union Railway Company had already received 214,500*l.*, and interest, under the powers of the two last-mentioned Acts; and that they had misapplied the said money, in employing it in works to which the same was not authorised to be applied by the said Acts, or either of them; and that, unless restrained by injunction, they would in like manner misapply the said sum of 85,500*l.*, which was to be received on the 31st December, 1848.

The bill charged, that the proposed scheme of extension to Norwich would be unproductive, and that it was carried out for the personal convenience of the shareholders, other than the holders of the 6*l.* per cent. stock; and that the interest of such shareholders was represented by the defendant S. B. and three others, who resided at Norwich. The bill contained the usual charge, that the proprietors of scrip stock were too numerous to make them all parties to the suit.

Mr. *Wood* and Mr. *Daniel*, for the defendants, in support of the demurrer, contended that the plaintiff was merely a holder of a certain species of security which he had purchased in the market; but that this gave him no right to inquire into the application of the monies, or to interfere in the management of the Company; that the money raised was so raised under the general powers of the two Acts, under which it became part of the general capital of the Company: *Yetts* v. *The Norfolk Railway Company*(*a*); that the holders of scrip had all the security and all the benefit for which they had contracted, in whatever manner the sum subscribed for was applied; that the plaintiff could not found his equity on a resolution passed at a meeting held six months previously to his purchase; and

(*a*) Ante, Vol. 5, p. 487.

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that the form of certificate, which alone shewed the contract between the purchaser and the Company, did not contain anything to confine the application of the money to one purpose, or to shew that the money had been raised for a particular purpose; that the power of raising particular sums under particular Acts, was for the purpose of fixing a limit to the general expenditure, but was not intended to interfere with the powers of the managing body as to its application or expenditure, or as to the manner or order in which the railways were to be made: *Ware* v. *The Grand Junction Waterworks Company* (*a*), *Cunliff* v. *The Manchester and Bolton Canal Company* (*b*); that there was nothing in the bill to shew that the Company had abandoned the intention of making the Harwich branch, but merely that they had postponed its construction. It was quite clear that they might be compelled to make the line. The whole of the undertakings were under the management of one Company, and formed one undertaking, although composed of different lines; and the making of the railway was intrusted to the Corporation, and was a matter solely for the discretion of the body of the shareholders and the directors, and subject to the resolutions made by them at the public meeting of the Company. So long as the money raised was applied to the legal purposes of the Company, the Court could not interfere, but must leave the management and control of that money to the machinery of the particular Company to whom it was by Act of Parliament intrusted: *Mozley* v. *Alston* (*c*), *Foss* v. *Harbottle* (*b*); that it did not appear that the body of shareholders were opposed to the present application of the monies, but, on the contrary, the allegations of the bill would rather shew that the majority approved of it. How, then, could a Court of equity interfere on behalf of persons who

(*a*) 2 Russ. & My. 470.
(*b*) Id. 480, n.
(*c*) Ante, Vol. 4, p. 636.
(*d*) 2 Hare, 461.

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neither represented the shareholders nor the Company? A bill, if sustainable at all, would only be so at the suit of the Corporation: *Preston* v. *Grand Collier Dock Company*(a), *Attorney-General* v. *Wilson*(b).

There is an allegation in the bill, that a meeting could not then be called, which is an admission that the plaintiff had that resource at some future time or under other circumstances. The true position of the plaintiff was simply that of a creditor of the Company: *Garrard* v. *Lord Lauderdale*(c).

On the question of parties, it was contended that the plaintiff, being a holder of registered scrip, and also of an unregistered scrip certificate, represented opposing interests. In the character of registered scripholder, he represented those whose interest was opposed to that of the mere scripholder, viz. the shareholders, who had been properly made defendants to the suit; and in respect of his unregistered scrip, he professed to sue on behalf of parties who were mere creditors, but formed no part of the corporate body, and had no voice in the management or affairs of the Company. It was also contended, that the original subscriber of whom the plaintiff had purchased his scrip, ought to have been a party, inasmuch as scrip was not assignable at law: *Taylor* v. *Salmon*,(d), *Walburn* v. *Ingoldby*(e), *Smith* v. *Goldsworthy*(f).

The *Solicitor-General*, and Mr. *Grove*, in support of the bill.—There are two issues raised by this bill. *First*, that the Company are applying the sums subscribed by the plaintiff, and those on whose behalf he sues, to a purpose not authorised by the Act of the Company, which enables them to raise these sums, and that no meeting or resolution of the shareholders can legalise such application; and

(a) Ante, Vol. 2, p. 335.
(b) Cr. & Ph. 1.
(c) 3 Sim. 1.
(d) 4 My. & Cr. 134.
(e) 1 My. & K. 61.
(f) 4 Q. B. Rep. 430.

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secondly, that a contract has been entered into by the Company with the plaintiff, and those on whose behalf he sues, that the monies subscribed by them shall be applied to a particular and special purpose, and that the present actings and doings of the Company are in fraud of that contract.

The plaintiff does not profess to be a shareholder, but to be a holder of scrip certificates, which represent stock, and not shares, and which stock is in fact, nothing more or less than a bond or mortgage debt from the Company. Unless the scripholders exercise the option given to them by the terms of the resolution, of becoming shareholders within five years, they have no shares in any profits, but receive the fixed rate of interest of 6*l.* per cent., and are free from all debts and liabilities of the Company. By the 38th section of the Companies Clauses Consolidation Act (8 Vict. c. 16), the Company have only the power of borrowing, "subject to the restrictions contained in the special Act:" *Tyrrell* v. *Woolley* (*a*). It is a fraud not only on the scripholders, but also on the legislature, that a Company should represent that a sum of money is required for a particular and special purpose, and then apply it to another. If the Company require more funds to complete their line to Norwich, they must apply to Parliament for further power to enable them to raise those sums, but a Court of equity will never permit a Company to pursue a course entirely at variance with the representations made by them to the public. [The following cases were cited: *Colman* v. *Eastern Counties Railway Company* (*b*), *Chapple* v. *Cadell* (*c*), *Reg.* v. *Eastern Counties Railway Company* (*d*), *Blakemore* v. *Glamorganshire Canal Company* (*e*), *Gray* v. *Chaplin* (*f*), *Natusch* v. *Irving* (*g*).]

(*a*) 1 M. & G. 809.
(*b*) Ante, Vol. 4, p. 513.
(*c*) Jac. 537.
(*d*) Ante, Vol. 2, p. 260.
(*e*) 1 My. & K. 154.
(*f*) 2 S. & S. 267.
(*g*) Gow on Pp., App. 398.

Mr. *Wood*, in reply, contended, that, under the Acts of this Company, there were only two ways of raising money, either by shares, or, by bond or mortgage: there was no third course; the plaintiff was not an obligor or a mortgagee, and must therefore be a shareholder, and in that character would only have the rights and remedies of a shareholder, as one of a Company. If the directors were misapplying the monies of the Company, they being the sole parties doing the illegal act, there could be no equity against the Company, and their demurrer must be allowed. There was no allegation that the Company had refused to join as co-plaintiffs. The plaintiff had not shewn his title to the scrip. The case of *Midland Great Western Railway Company* v. *Gordon* (*a*), and *Knight* v. *Barber* (*b*), were cited.

The VICE-CHANCELLOR, after stating the several Acts under which the Eastern Union Company derived their powers before the passing of the Acts which authorised the construction of the Harwich branch, and the purchase of the Hadleigh Junction Railway, observed, that, upon the passing of the Act of amalgamation, of the 9th July, 1847, it appeared that the Eastern Union Railway Company became charged, inter alia, with the completion of the railway from Ipswich and Bury St. Edmunds to Norwich; and that the said Acts, and the two other Acts of 1847, (8th of June and 22nd of July), exhibited the existing position of the Eastern Union Railway Company, except so far as it had already executed the works empowered to be done by them, under such Acts; and that, assuming that the line to Norwich was incomplete, and that none of the works authorised to be done by the two last-mentioned Acts had been completed, the Eastern Union Railway Company at the present time stood charged

(*a*) Ante, Vol. 5, p. 76. (*b*) Ante, Vol. 4, p. 674.

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with the completion of the Norwich line, Hadleigh junction line, (if the contract had been completed), and the Harwich line and pier; and that, upon the demurrer, this must be taken to be in substance the state of the case, proceeded as follows:—

The bill contains allegations, which, as I read them, do not amount to this—that the Company have finally abandoned the intention of making the Harwich branch, but that they have postponed the same indefinitely, with a view to the more speedy completion of the Norwich line. I cannot, I think, upon demurrer, read the bill more favourably for the plaintiff. The bill then charges, that the directors, finding themselves unable to raise sufficient capital for the purpose of completing both the Norwich line and the Harwich branch, have determined to misapply, and have already, to a great extent, misapplied the money raised under the Eastern Union and Harwich Railway and Pier Act, 1847, and under the Eastern Union and Hadleigh Junction Railway Sale Act, 1847,—by employing the same in constructing the Norwich line, and for other unauthorised purposes. Charges to this effect are repeated in different parts of the bill; and there is also a charge, that the directors intend, in like manner, to misapply the 85,500*l.*, which is payable on the 31st of December instant, that is, immediately after the filing of the bill. This the bill charges is illegal, and relief is prayed accordingly.

Now, before noticing some objections which have been taken to the frame of the bill, I shall consider the general point of law which the demurrer raises. I give no opinion upon the right of the Company to apply any portion of their general assets, including as part of such general assets the money raised under the powers of the Harwich Act, to the construction of the Norwich line. Those monies are declared to be part of the general assets of the Company, and the works to be done under the Har-

wich Act are part of the general undertaking of the Eastern Union Railway Company; and the legislature may have thought it right that the application of the general capital on the one hand, and the construction of their general works on the other, should be left to the unfettered discretion of the Company, leaving it to the directors, in the first instance, and next to a general meeting of the shareholders, to determine in what manner and order the works should be done and the general capital applied,—as in the case of a private partnership. But the legislature may also have thought it right to provide, that the capital raised for a specific purpose, should not be applied for any other purpose. And if such a state of things exists, with reference to any of the capital to be raised under any of the Acts I have mentioned, the application of capital so appropriated to any other than the specified purpose, must be unlawful.

Now this appears to me to be very clearly the case with respect to the 100,000*l.* raised under the Hadleigh Act, as the Hadleigh branch was purchased by the Company; and, as it is sufficient, upon general demurrer, for the plaintiff to shew that his complaint is, to any extent, right, I think the plaintiff in this case has shewn that the directors have misapplied, and are about to misapply, the 100,000*l.* I have adverted to,—that is, the 100,000*l.* raised under the Hadleigh Act. No majority of the shareholders, however large, could sanction the misapplication of this portion of the capital. A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful. This appears to me to take it out of the case of *Foss* v. *Harbottle*(*a*), to which I was referred. That case does not, I apprehend, upon this point, go further than this: that if the act, though it be the act of the directors only, be one which a general meeting of the Company

(*a*) 2 Hare, 461.

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could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the Company might immediately confirm and give validity to the act of which the bill complains.

Upon the merits, therefore, I think the demurrers in this case must be overruled.

Some objections were, however, taken to the frame of the bill, which require much consideration. It was not, I think, argued by the defendants, that the proprietors and holders of scrip certificates in the perpetual stock had not such an interest in the application of the capital of the Company as was necessary to enable them to maintain a bill properly framed, to prevent a misapplication of the capital of the Company. It clearly could not be so argued; for there was an inchoate right in such parties to become general shareholders in the Company. Nor was it argued that the proprietors of registered certificates had not a similar interest; but it was said that the interests of the proprietors and holders of scrip certificates, and the interests of the proprietors of registered certificates, conflicted with each other; and that, as the plaintiff must sue on behalf of both classes, the bill could not be sustained. I cannot take that view of the case. The holder of the scrip has an inchoate right to become a registered holder of the perpetual stock, and it is the interest of both classes in that stock which entitles him to sue; and if the scripholder has performed his conditions up to the time of filing the bill, there is no such conflict as the argument suggests.

Assuming this to be the case, and that the charges in the bill are true with reference to the number of persons who are proprietors or holders of scrip, and who are proprietors of registered certificates, and that one at least of the acts complained of is altogether illegal, I think the case is one in which one person interested in the perpetual 6*l.* per cent. stock may sue on behalf of himself and others by a bill properly framed for the purpose.

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Another objection taken on the part of the Company was, that the Company ought not to be a party to the suit. That applies to the demurrer by the Company. This objection I have no hesitation in overruling. The acts of the directors of which the bill complains were the acts of the directors as the representatives of the Company, and, as such, were the acts of the Company itself. The object of the suit, amongst other things, is to restrain the Company from doing the acts complained of; and the Company would not be bound in this suit, unless it were a party in its corporate character. This frame of suit is admitted by the Court as the only means of binding the Company, in a case in which the question arises between some of its own members, whether that which the Company is about to do, or has done, is a lawful act. In truth, the only regular way of suing the Company is as a corporation; but in a case where a dispute arises between the members of the Company as to the legality of the acts done or intended to be done by the managing body of the Company, and a suit becomes necessary, the Court, as the only means of trying the question, allows some of its members to sue the others; but still, it is the Company against whom the question is raised. I do not think there is any question or doubt upon that in any of the cases.

The last objection I need notice is, that the vendors of the plaintiff's unregistered shares in the perpetual stock of the Company (the plaintiff being a purchaser, and not an original subscriber for such scrip), ought to be, and are not, parties to the suit. To this objection I was at one time disposed to yield; but, looking at the language of the resolution of the 21st of August, 1847, the form of the certificate entitling the original holder of the scrip and his assignee to the benefit of the rights the certificates conferred, and looking also to the recognition of the plaintiff's rights by the Company, and the payment and acceptance of his calls, I think the plaintiff can sustain this bill without making the vendors of the scrip parties to the

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suit. It is true, as it was argued, that the contract was, in the first instance, between the Company and the original subscriber; but that contract gave the original subscriber a right to be discharged, by transferring his scrip with its liabilities to another. The plaintiff became the purchaser, and is now, on the allegations of the bill, the lawful holder of the scrip; and he therefore became entitled, on the 1st of January, 1849, on performing the conditions of the certificate, to be admitted a registered shareholder. The Company, in conformity with the original contract with the scripholder, discharges him from his liability, and accepts the plaintiff as his assignee, and has thereby given him a right to sue as between himself and the Company. It will be remembered, that, in all these cases, it is much too broad a proposition to say, that a debt cannot be transferred at law. A debt or liability may be transferred, in point of fact, where there are three persons dealing as these parties in this case dealt. If A. be indebted to B. in a sum of money, and B. to C., and C. to A., those three persons may agree to a settlement of accounts as between each other, and that the one who owes most shall pay the difference to the one who is entitled to receive it. A payment in pursuance of such an agreement would in law discharge the party making it, and in that manner there may be a transfer of the debt. This is nothing more than a contract made between a Company and the original scripholder, the latter agreeing to transfer his liability, and the Company to accept the transferree. The new holder or transferree of the scrip goes to the Company, and the Company acknowledges his right to it, accepts his payment of the calls, and promises to register his shares, or at least undertakes to do so by treating him as a scripholder. The proposition is much too broad, that, in none of these cases can you avoid the necessity of making the original holder a party. *Walburn* v. *Ingilby* (*a*) has no application to this case.

(*a*) 1 My. & K. 61.

The demurrers must be overruled.

From this judgment the defendants appealed.

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The case was argued by the same counsel as in the Court below.

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The LORD CHANCELLOR:—This is a bill filed by a gentleman, calling himself a proprietor of scrip, on behalf of himself and other proprietors of scrip certificates, for perpetual 6*l.* per cent. stock, 1849, in the Eastern Union Railway Company, and also such perpetual stock, on behalf of certain or other owners of certificates in the said stock. And it prays, amongst other things, to restrain the Company and those individuals who are named, being directors of the Company, from employing any money which has been subscribed by the plaintiff and the other holders of the scrip, towards the carrying on a railway to Colchester, or otherwise than in the direction of the works for which that money was subscribed. Now, the bill is founded, no doubt, upon that equity which I lately considered as properly applied by the Master of the Rolls, in the case of the Direct Portsmouth Railway Company (*a*), where a Company, having obtained an Act of Parliament, and obtained subscriptions and procured advances of money for the purpose of carrying a railway from Epsom to Portsmouth, afterwards finding out that they could not, or thought it not advisable, to carry on the whole of the line, proposed to make that portion of it which was between Epsom and Leatherhead only. It appeared that they had abandoned the farther portion of the line, and therefore there was no intention of carrying on the railway, as projected, to Portsmouth from Epsom; but that they thought it convenient and advisable, and for the benefit of the Company, to continue it from Epsom to Leatherhead only, being a portion of the

(*a*) *Cohen* v. *Wilkinson*, ante, Vol. 5, p. 741.

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line. The Master of the Rolls thought it was a departure from the purpose for which the subscription was made, and that the Company was not at liberty so to apply the money which had been raised for the purpose of making the whole of the railway throughout the whole of the distance. It came before me, and I was of that opinion, although the portion of the line proposed to be made was part of that line which would have been to be made if the whole scheme had been carried into effect. The order of the Master of the Rolls for an injunction was very carefully framed for the purpose of not interfering with that which would have made the projected works legitimate; he restrained them from carrying on the works or making the railway between Epsom and Leatherhead, otherwise than for the purpose of effecting the whole scheme; and they having abandoned the whole scheme, of course it operated as an injunction against carrying on the works which they then contemplated. But the mode in which the injunction was framed marked the principle on which the injunction was granted; that, although it was part of the work, yet, not being part of the work for the purpose of effecting the whole, the defendants ought not to be permitted to go on with it.

The case made by this bill, in some particulars to which I shall have occasion to refer, is this: that a previously existing railway Company thought it desirable to construct two branch railways connected with their own, or rather to purchase one and make the other, and two Acts were passed authorising the raising of a sum of 100,000*l.*, for the purpose of purchasing a branch to Hadleigh, and 200,000*l.* for making a new and distinct branch from a junction with the former railway, the Eastern Union Railway, to Harwich. That the directors, or the Company, whose agents the officers and directors are, being determined not to carry into operation these two schemes, are applying the money so subscribed for the purpose of carrying on another portion of the original railway,

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and completing it to Colchester. This case, undoubtedly, raised the same question as in the *Direct Portsmouth case*, and, if the facts stated in the bill are sufficient for that purpose, it will be within the principle of the case to which I have referred, inasmuch as it will shew that money has been raised by the plaintiff and those who are represented by the plaintiff, for one purpose, which the Company are projecting and intending to apply to another. It is impossible, if there are allegations in the bill sufficient to bring it within it, to say that this bill is not maintainable on the same principle, as I was of opinion the bill, in the former case, was. It appears to me, upon reading this bill, it does most distinctly bring it within this principle. Of course, the facts may be all fictitious. There may be nothing in the case made by the bill; but as it appears, it is very distinct, that this money was raised for the purpose of particular works, and those particular works are alleged to have been entirely abandoned, and the intention of applying the money raised under these two Acts of Parliament are proposed to be applied for carrying out works totally foreign to the purpose of those who subscribed the money, under the provisions of those two Acts.

Now, it is in vain to speculate on what motives parties might have had in advancing their money. It may be, that the plaintiff here had an independent private reason for promoting a railway to Harwich. It may be, that they who subscribed the 100,000*l.*, may have had some reason for promoting the purchase of the railway to Hadleigh by the Eastern Union Railway Company. It is impossible to speculate upon that: every man acts, of course, according to his own view of his own interest and wishes; and the question is, whether the law will permit money advanced for one purpose to be applied, contrary to the wish of the owner of that money, to another, and whether the bill states such a case as brings it within that principle. [His Lordship then referred to the several original Acts hereinbefore mentioned.]

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The Harwich Act recites, that it would be attended with public advantage, if a railway were made from the line of the Eastern Union Railway to the port of Harwich, with two small branch railways therefrom; and also, if a pier or jetty were made." And then, among other things, it is enacted, that it should be lawful for the Eastern Union Railway Company to raise, for the purposes of their Act, in addition to the capital which the said Company were authorised to raise, under and by virtue of other Acts therein recited, and in addition to any other sum which the said Company might be authorised to raise by any Act to be passed in the then present session of Parliament, any further sum of money, not exceeding in the whole the sum of 200,000*l.*; and that the capital thereby authorised to be raised should be considered as a part of the general capital of the Company, and be subject to the same provision in all respects, whether with reference to the payment of calls or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital, except as to the amount of such shares and the times of making calls thereon, and the amount of such calls. And that it shall not be lawful for the said Company, out of any money by this Act, or any other Act, relating to the said Railway Company, authorised to be raised for the purposes of such Act or Acts, to pay or deposit any sum of money which, by any standing order of either House of Parliament then in force, or thereafter to be in force, might be required to be deposited in respect of any application to Parliament for the purpose of obtaining an Act authorising the said Company to construct any other railway. Now, it has been said that these provisions make the capital to be raised under this Act part of the capital of the whole Company; but that is not the question, because, although it may for certain purposes be described and considered as part of the capital of the whole Company, the question is, whether it was not raised for a special particular purpose, and therefore to be so applied,

or whether it was intended to be left to the discretion of the directors to apply this in common with the original capital for purposes not contemplated, and which were not intended to be provided for by the special Act. I consider that the meaning of this enactment is, that there should be a sum of money raised for the purpose of the special Act, which was to make a railway to join the Eastern Union Railway, from thence to Harwich; and it is only declared to be made part of the capital of the Company, not with reference to the mode in which it has to be applied, but as regards all the Acts and powers and mode of dealing with the property in the hands of the directors, which are prescribed by former Acts. It is to be considered as part of the capital of the Company, for the purpose of incorporating within this Act all the provisions and regulations which are comprised in the former Acts, directing the mode in which the Company are to deal with, and give directions relative to, the money coming to their hands; for it is in terms declared, that it shall be a part of the capital of the Company, and subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares, or the non-payment of calls, or otherwise, as if it had been part of the original capital; that is to say, all the provisions found in the former Acts regulating the original capital, are to be applicable by the Company in dealing with those additional shares. But the provision to which I have referred, that it shall not be lawful for the directors to make use of this capital for the purpose of deposit, is also very strong to shew that there was no intention of amalgamating this capital with the original capital. If this were money entirely at their disposal, that provision would be wholly unnecessary; but it keeps it untouched and unaffected by any purpose which the Company might have of using it with a view to making the deposit; keeping it, therefore, strictly for the purposes to which the Act refers.

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Then comes the Hadleigh Act, which is very much the same with the Harwich Act. I observe that the Vice-Chancellor relies principally on the Hadleigh Act, but for what reason I am not very well aware. They both appear to me to be very much open to the same observation. [His Lordship then referred to the parts of the Harwich Act hereinbefore stated.] In both these Acts a specific purpose was entertained, and that purpose was to be met and accomplished by means of the additional stock to be created under the authority of each of these Acts. The bill sets out that which is not, undoubtedly, immaterial, viz. a statement of the report and resolutions. [His Lordship then read the report and resolution of the 21st of August, 1847.]

Now it is impossible to say, after that, that these stocks are all united and mixed up in one fund; they are as distinct in point of amount of interest payable, and in point of security, as they possibly can be; they are raised specifically for the purpose of those two Acts, and they bear a different rate of interest, 6*l.* per cent., and they are guaranteed by the other fund. They have, therefore, a preference over the holders of the other fund; and, in a particular event, they are to fall into the original stock. That of itself would be quite sufficient to shew that they were never considered as identical with, or part of, the original stock: they are perfectly distinct; and this resolution is not only important, as constituting part of the contract, but undoubtedly it is a representation operating upon the minds of the parties advancing the money, telling them for what purposes the money was to be raised, and in what manner it was to be secured, and what was to be the amount of the benefit to arise from the subscriptions that they were to make.

There was a long speech made by the Chairman, not material to be taken into consideration now, and there is a resolution of the Company, who would be the body to deal with the public, inviting them to come forward. It

is no doubt a representation binding as between the Company itself, and those who might advance the money to them. There is in the bill a distinct allegation which the defendants, by demurring, admit to be the fact, viz. that the directors have resolved not to carry into effect the railway from the junction to Harwich. [His Lordship then read over the other allegations in the bill, set forth in the statement of this case.]

These are the allegations of title, and all the allegations of the misapplication of the monies upon which the question upon the demurrer depends. No doubt the first question is upon the construction of the Acts of Parliament; if the bill be wrong on the construction of the Acts, then the allegations would not be material. I am clearly of opinion that those who subscribed for the purposes of the two Acts have a right to have their money applied to the purposes held out to them, not only by those Acts, but by the resolutions of the Company, stating the purposes for which their money was to be applied; and, upon the authority of the case I have before referred to, I entertain no doubt that the parties have a right which this Court will enforce; for I find the positive allegation that they not only intend to misapply the money, and apply it for other purposes, but that they have actually done so, and intend to persevere in so doing. On the authority of the case I have referred to, it is equity that the party whose money has been so applied, and which is intended to be hereafter so applied, is entitled to the interposition of this Court, for the purpose of keeping the Company in the application of his money to those purposes for which it was said it was to be advanced.

That disposes of the principal grounds upon which the demurrer rests. With respect to the other objections raised to the bill, it appears on the facts that there is no foundation for them. It is true this plaintiff is a shareholder, and is a member of the Company, and he is the holder of this particular scrip; as a proprietor of this particular stock, he and those who had advanced the money which formed that

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particular stock, being the holders of the scrip upon which it is secured, have an interest totally unconnected with the general purposes of the Company; and that is the very ground of his equity. He says, "It is true I am a member of the Company, but I am also a holder of this scrip; and as a holder of this scrip, I have an equity and a right independently of the general purposes for which you, the directors, are carrying on this concern. If I had no scrip, I should be merely a member of the Company; but having that scrip, I file my bill as proprietor of that scrip." It is entirely clear of all the cases that have been referred to, and gives that description of persons who are represented by the plaintiff, and the plaintiff himself, a *locus standi* here, to see to the application of that money as to which he holds scrip as a proprietor, quite unconnected and independent of any objection that might arise as to his being a member of the Company.

Then with respect to the other objections: I am not going through them all;—it is not necessary to go through them all. It is said he is holder of the scrip, and not an original subscriber, and as holder only of the scrip he was not the party with whom the contract was originally made. The party who holds the scrip is the party the Company looks to: it is not merely the original contractor, but the party who holds the scrip; it is a marketable and transferable security, and whoever holds it, is invested with all the rights of the original party who signed the scrip. He purchases it with certain rights attaching to that species of property; and this is one of those rights which he is endeavouring to assert. I do not think, therefore, there is any objection in point of form to the shape in which this bill is framed, and upon the general equity it falls within the principle to which I have referred; and therefore, I think the judgment of the Vice-Chancellor is correct, and this appeal must be dismissed, with costs.

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COURT OF EXCHEQUER.

Hilary Term, 1849.

THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY *v.* GOODWIN. *Jan. 17th.*

Debt on bond given by the defendant and another to the L. and C. Railway Company, as sureties for the due performance by E. G. of his duties as clerk. The condition of the bond was, that if E. G. should render to the L. & C. Railway Company, or to the committee for managing the London terminus of the L. and C., L., and B., and S. E Railways a true account of all the receipts and payments of him as such clerk, and also should pay to the L. and C. Railway Company or committee, then the obligation to be void. The defendant pleaded, *thirdly*, that the bond was made before the passing of the 9 & 10 Vict. c. cclxxxiii, to consolidate the L. and B. and L. and C. Railway Companies, and that the action was commenced afterwards, and that the L. and C. Railway Company thereby became dissolved. *Fourthly*, that, from the time of the making of the bond up to the time of the passing of the said Act, E. G. rendered to the L. and C. Railway Company an account of all receipts and payments, and paid all sums received by him as such clerk:—*Held*, that the third plea was bad, and was no defence to the action, inasmuch as the new Company was the same as the two old ones, with additional powers, and that the amalgamation of the Companies did not affect the responsibilities of the defendant or E. G. That the fourth plea was also bad, for not alleging a payment to the committee of the monies received by E. G. on account of the three Companies.

DEBT.—The declaration stated, that the defendant, before the passing of an Act of Parliament made in the 10th year of the reign of her present Majesty, "to consolidate and unite the London and Brighton and the London and Croydon Railway Companies," to wit, on the 9th of April, 1846, by his certain writing obligatory (profert) acknowledged himself to be held and firmly bound to the London and Croydon Railway Company in the sum of 1000*l.*; whereby and by reason of the non-payment by the defendant of the said sum of 1000*l.*, either to the London and Croydon Railway Company, before the passing of the said Act of Parliament, or to the plaintiffs since the passing of the said Act, and by virtue of the provisions of the aforesaid Act of Parliament, an action hath accrued to the plaintiffs, &c.—Breach, non-payment.

The defendant set out the bond on oyer, and the condition as follows:—

"Whereas Edward Goodwin has been appointed to the

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situation of chief clerk or cashier to the booking office of the London station of the London and Croydon, London and Brighton, and South Eastern Railways, and it was at the time of such appointment stipulated and agreed, that the said Edward Goodwin should find and provide two sufficient sureties for his good conduct, to join with him in the above-written bond or obligation to the above-named London and Croydon Railway Company, as a security to the said Company for the due fulfilment of the office of chief booking clerk or cashier. And whereas it was also agreed and stipulated, that Edward Goodwin should, as such chief booking clerk or cashier, have the general superintendence and management of the booking department at the said station, and cause the other booking clerks employed there to render and deliver to him daily accounts of all monies which they may receive for or on account of the said Company, and pay over to him from day to day all such monies; and in the event of any or either of such clerks refusing or neglecting so to do, then that he the said Edward Goodwin should report the same to the secretary for the time being, or the committee for managing the London terminus of the said London and Croydon, London and Brighton, and South Eastern Railways. Now, therefore, the condition of the above-written obligation is such, that if the said Edward Goodwin do and shall from time to time and at all times hereafter, when and so often as he shall be thereunto requested, render to the said London and Croydon Railway Company, or to the said committee for the time being, a full, true, and particular account of all the receipts, payments, transactions, and dealings of him the said Edward Goodwin as such chief booking clerk or cashier as aforesaid, and also do and shall well and truly pay or cause to be paid unto the London and Croydon Railway Company, or to the said committee, all such sum or sums of money as he the said Edward Goodwin shall or may have had or received on account of

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the said Company or committee, and also all such sum or sums of money as he shall or may have had or received from the booking clerks of the said station, or any or either of them, on account of the said Company or committee, or which, without his wilful neglect or default, he might have had or received, or caused to be had or received, by the said London and Croydon Railway Company, or the said committee &c., then the above-written obligation to be void," &c. He then pleaded non est factum.

Second plea—That E. Goodwin, from the time of making the writing obligatory and condition, continued in the situation of chief clerk or cashier up to a certain day before the commencement of this suit, when he discontinued and ceased to hold the same. That E. Goodwin, while he so remained in and held the said situation, did from time to time and at all times, to wit, when and as often as he was thereunto requested, render to the London and Croydon Railway Company, and to the committee for the time being, a full, true, and particular account of all the receipts, payments, transactions, and dealings of him the said E. Goodwin as such chief booking clerk and cashier, and did well and truly pay to the London and Croydon Railway Company and to the committee all sums of money which he had or received on account of the said Company and committee, and also from the other booking clerks at the said station, and every of them, on account of the said Company and committee, amounting to 200,000*l.*, the same being all the money which, without his wilful neglect or default, he might have had or received, or did have or receive, or might have caused to be had or received by the London and Croydon Railway Company, or committee &c.—Verification.

Third plea—That the said writing obligatory and condition was made and executed by the defendant, and E. Goodwin, and C. Goodwin, to the London and Croydon Railway Company, before the passing of an Act of Parliament to con-

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solidate and unite the London and Brighton, and the London and Croydon Railway Companies and the undertakings belonging to them. That this action was commenced after the passing and coming into operation of the said Act of Parliament, and that, from and immediately after the passing of the said Act of Parliament, the said London and Croydon Railway Company became and was thereby dissolved.—Verification.

Fourth plea—That the said writing obligatory was made before the passing of the said Act of Parliament, and that this action was commenced afterwards. That, from the time of making the writing obligatory, continually, up to and until the passing and coming into operation of the said Act of Parliament, the said E. Goodwin did from time to time, at all times when, and as often, and as he was thereunto requested, render to the London and Croydon Railway Company a full, true, and particular account of all the receipts, payments, transactions, and dealings of him the said E. Goodwin as such chief booking clerk or cashier as aforesaid. And the said E. Goodwin did also pay unto the London and Croydon Railway Company all the sums of money which he had had or received on account of the said Company, and also from the other booking clerks at the said station, on account of the said Company, amounting to 200,000*l.*, the same being all the money which, without his wilful neglect or default, he might have had or received, or did have or receive, or might have or cause to be had or received, or did cause to be had or received, by the London and Croydon Railway Company.—Verification.

Replication to the *second plea* (*a*).

Special demurrer to the *third plea*—That the dissolution

(*a*) The points arising on the replication to the second plea are omitted, as they do not come within the scope of these Reports; that replication is also omitted.

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of the London and Croydon Railway Company was no answer to the action.

Special demurrer to the *fourth plea*—That the defendant has not shewn a performance of the condition up to the time of the passing of the Act, for it is consistent with the statements in the plea, that E. Goodwin did not render to the committee a full account of his receipts, payments, &c., as such chief booking clerk or cashier, and that he may not have paid to the committee the monies received by him on account of the said Company; that E. Goodwin may have received monies on account of the committee, and not paid them to the committee or the Company.

Joinder in demurrer, and special demurrer to the replication.

Crompton, in support of the replication and demurrers to the pleas (*a*).—The question on the *third* plea depends upon the Amalgamation Act (*b*). The 1st section of that statute dissolves the Companies then existing, and the 4th incorporates a new Company by the name of The London, Brighton, and South Coast Railway Company. By the 5th section there is vested in the Company certain works, and "all lands, tenements, hereditaments, easements, rights, powers, and privileges whatsoever, and the benefit of all contracts, agreements, and proceedings in any way relating thereto, of or to which the said dissolved Companies or any of them were seised, possessed, or entitled at law or in equity." The 6th section vests in the newly incorporated Company all bonds, debts, and securities, &c., and all rights and remedies for enforcing payment thereof, which before the passing of the Act belonged to the dissolved Companies, and declares, that all bonds, covenants, and securities made or entered into before the passing of that Act with the dissolved Companies, shall remain valid and ef-

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.
(*b*) 9 & 10 Vict. c. cclxxxiii.

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fectual in favour of the newly incorporated Company, and may be enforced in the same manner as if that Company had been party thereto; that plea is therefore bad. [*Parke*, B.—It seems clear, that, as far as regards the breach in not paying over the money received for the London and Croydon Company, the statute transfers all right to the plaintiffs; but the question is, as regards the money received for the London and Brighton Railway Company.] As to the *fourth* plea, that affords no answer to the action; the effect of it is, that, up to the time of the passing of the Act of Parliament, E. Goodwin paid to the London and Croydon Railway Company all monies received by him on account of that Company. But the intention of the parties to the bond was to secure the due payment of all monies received by E. Goodwin for all the Companies at the London station. It cannot be taken on this plea, that the office has determined; and monies might have been received after the passing of the statute, though previously due. Further, there is no statement in the plea, that E. Goodwin rendered to the Croydon Company or to the committee a true account of all receipts and payments, or that he paid to the committee all the monies which he received on their account. [*Parke*, B.—It is quite consistent with this plea, that he may have been asked by the committee to pay over the money to them, and may have refused to do so.] He then argued, that the replication was good, and cited the following cases: *Tombs* v. *Painter* (*a*), *Hancocke* v. *Prowd* (*b*), *Parker* v. *Atfeild* (*c*), *Aston* v. *Sherman* (*d*), *Lord Arlington* v. *Merricke* (*e*), *Parker* v. *Wise* (*f*), and *Webb* v. *James* (*g*).

Peacock, contrà.—It was not the intention of the parties that E. Goodwin should account to the committee for monies received on account of the three Companies; but if

(*a*) 13 East, 1.
(*b*) 1 Wms. Saund. 337 c, n. (5).
(*c*) 1 Salk. 312.
(*d*) Id. 298.
(*e*) 2 Wms. Saund. 403.
(*f*) 6 M. & S. 239.
(*g*) 8 M. & W. 645.

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it was, that obligation terminated when two of these ceased to exist.

The duties which the clerk E. Goodwin would have to perform to the London, Brighton, and South Coast Railway are more extensive than those for the performance of which the defendant became bound; he has never contracted that liability. [*Parke*, B.—The bond is given to the London and Croydon Company, as trustees for all of the Companies. There is in fact no new Company, but merely the old Companies with different names and powers. Suppose the London and Croydon Company had obtained an Act of Parliament enabling them to form a branch line, or to widen the old one, would not E. Goodwin have been liable to account, and the defendant equally liable on this bond? Or suppose a clerk bound to account to a merchant engaged in the West India trade, and the merchant afterwards extended his trade to the East Indies, would that discharge the clerk's obligation? Is it not the same with a Railway Company who extend their line? The only effect of the statute is to unite the two Companies, and the clerk is now bound to account to the London, Brighton, and South Coast Railway, as he was before the dissolution of the old Company.] It is submitted, that this is altogether a new concern; suppose a person became surety for a carrier between London and York, he would not, it is submitted, be liable if the carrier extended his business to Edinburgh. [*Parke*, B.—E. Goodwin was bound to pay to the London and Croydon Company, or to the committee, all sums received at the London station on account of the three Companies. The plea does not allege a payment to the committee; and, assuming that the clerk might pay either to the London and Croydon Company, or to the committee, the monies received on account of both, the plea is bad for not shewing a sufficient performance of the condition up to the time of the dissolution of the two Companies. It is not averred that the clerk paid all monies received on account of the London and Croy-

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don Company and the committee, but only that he paid to the London and Croydon Company the monies received on account of that Company. The union of the two Companies does not alter the condition of the principal or surety, and the clerk must account to the new joint corporation for all that he was before bound to account.]

Judgment for the plaintiffs.

COURT OF EXCHEQUER.

Trinity Vacation, 1849.

July 5th.

REEDIE *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

In an action for negligence there is no distinction between injuries arising from the careless and unskilful management of an animal or other personal chattel and an injury resulting from the negligent management of fixed real property, unless, perhaps, where the act complained of is such as to amount to a nuisance; therefore, where a Company empowered to make a railway contracted, under seal, with others to make and complete a portion of the line, and it was agreed that the works should be done by the contractors, and that the Company should have a general right of watching the progress, and, if the contractors employed incompetent workmen, of dismissing them, and during the progress of the works the workmen, through negligence, caused the death of a person passing along a public highway:—*Held*, that the Company were not liable in an action by the administratrix of the deceased, under 9 & 10 Vict. c. 93, (Lord Campbell's Act).

THIS was an action brought by the plaintiff, the widow and administratrix of one Patrick Reedie, to recover damages under the 9 & 10 Vict. c. 93. The declaration stated, that the said Company were possessed of a certain viaduct over a certain turnpike road and Queen's common highway, called the Gomersall and Dewsbury Turnpike Road, in the county of York; yet the defendants behaved and conducted themselves, in the making and constructing of the said archway over the said turnpike road and Queen's common highway, in so careless a manner, that, by reason of such careless conduct, a large portion of the materials of which the said archway was then being made and constructed, to wit, a large stone, fell upon the said P. Reedie, who was then lawfully passing under the said archway,

in and along the said turnpike road and Queen's common highway, and then greatly crushed, hurt, wounded, damaged, and injured the said P. Reedie, so then passing in and along the said turnpike road and Queen's common highway as aforesaid. And the plaintiff further says, that by reason of the premises the said P. Reedie, heretofore and after the passing of the said Act, and within twelve calendar months next before the commencement of this suit, to wit, on the day and year last aforesaid, died leaving him surviving the plaintiff, who before and at the time of his death was his wife, and Ann Reedie, Michael Reedie, &c., who before and at the time of his death were his children, and Martin Reedie, who before and at the time of his death was his father, to the damage of the plaintiff as such administratrix as aforesaid, of 1000*l.* And thereupon the plaintiff, as such administratrix as aforesaid, and for the benefit of herself and of the said children of the said P. Reedie, and of the said father of the said P. Reedie, according to the provisions of the said statute, brings her suit. Profert of letters of administration.

The defendants pleaded, *first*, not guilty; *secondly*, that they were not possessed of the archway.

The cause was tried at the last Summer Assizes for the county of York, before *Cresswell*, J., when it appeared that the action was brought under the 9 & 10 Vict. c. 93 (*a*), to recover compensation for the plaintiff and her family on account of the death of her husband P. Reedie, who was killed while passing under the viaduct which was in the course of erection. The viaduct passed over a public road, and, as the deceased was passing under it, some workmen employed by the contractors in the execution of the works, forced off the parapet to the road below, a huge block of stone, the consequence of which was, that Reedie was literally flattened on the spot.

By an Act of Parliament passed on the 30th of June,

(*a*) See this statute and the decisions upon it, Chitty's Statutes, by Welsby and Beavan, p. 1082, tit. "Death by Accident."

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1845, intituled "The Leeds, Dewsbury, and Manchester Railway Company, 1845," a Company was incorporated for the formation of the railway in question.

By an indenture dated the 29th September, 1846, made between the Company of the one part, and Joseph Crawshaw and Richard Crawshaw of the other part, the Messrs. Crawshaw covenanted with the Company that they would, in consideration of a sum of 55,000*l.*, make and complete a portion of the railway of the length of 3830 yards or thereabouts, with all excavations, embankments, bridges, tunnels, viaducts, roads, fences, and other works connected therewith, according to the specification referred to. It was provided by the deed that the works should be done by the contractors, but that the Company should have a general right of watching the progress, and, if the contractors employed incompetent workmen, the Company should have the power of dismissing them. Messrs. Crawshaw proceeded to execute the works, and, on the 9th of July, 1837, while they were in progress, another Act received the Royal assent, whereby it was enacted, that the said Leeds, Dewsbury, and Manchester Railway, with all and singular the undertakings thereof, as well those which had been commenced as those which had not, and all the real and personal estate of the said Company, should (subject to the existing debts, liabilities, and contracts of the said Company) be vested in the London and North Western Railway Company, and might be lawfully executed, completed, held, and enjoyed by them in the same way as they might have been executed, completed, held, and enjoyed by the said Leeds, Dewsbury, and Manchester Company, if that Act had not passed. After the passing of this second Act Messrs. Crawshaw continued to proceed with their work, and during that time the accident occurred.

At the trial, a verdict was found for the plaintiff, leave being reserved for the defendants to move to enter a nonsuit, if the Court should be of opinion that the action would not lie.

A rule nisi having been obtained,

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Martin, *Pickering*, and *Hugh Hill*, now shewed cause (*a*). —The defendants are liable, upon the principle that the known owner of *fixed* property is liable for an injury done in the progress of works going on for his benefit on that property, whether the persons causing the accident were his servants or not: *Grote* v. *The Chester and Holyhead Railway Company* (*b*), *Sly* v. *Edgley* (*c*), *Matthews* v. *The West London Water Works Company* (*d*), *Bush* v. *Steinman* (*e*), *Michael* v. *Alestree* (*f*), *Randleson* v. *Murray* (*g*); for it must be assumed that the owner of property in such a case has the control over all the persons working on his premises for his benefit. If the stone had been insecurely fastened in the wall, and, by reason thereof, had caused the accident, then, no doubt, they would be liable, and so are they in the present case. [*Parke*, B.—If a stranger had gone upon the premises unknown to the defendants, and had thrown off the stone, then the defendants clearly would not be liable; but if it were done with their consent, that would be different.] The legislature has conferred upon the defendants certain privileges, and with those privileges it has cast upon them the duty of seeing that these works, which can alone be executed by the defendants, shall be done so as to cause no injury in their construction. [They also referred to 8 Vict. c. 20, s. 53 (Railways Clauses Consolidation Act), *Bell* v. *The Hull and Selby Railway Company* (*h*), *Laugher* v. *Pointer* (*i*), *Quarman* v. *Barnett* (*k*), *Rapson* v. *Cubitt* (*l*), *Allen* v. *Hayward* (*m*), *Rich* v. *Basterfield* (*n*), *Semple* v. *The London and Brighton Railway Company* (*o*),

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.
(*b*) Ante, Vol. 5, p. 649; *S. C.*, 2 Exch. 251.
(*c*) 6 Esp. 6.
(*d*) 3 Camp. 403.
(*e*) 1 B. & P. 404.
(*f*) 2 Lev. 172.
(*g*) 8 A. & E. 109.
(*h*) Ante, Vol. 1, p. 616; *S. C.*, 6 M. & W. 699.
(*i*) 5 B. & C. 547.
(*k*) 6 M. & W. 499.
(*l*) 9 M. & W. 710.
(*m*) 7 Q. B. 960.
(*n*) 4 C. B. 783.
(*o*) Ante, Vol. 1, p. 120.

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The Duke of Newcastle v. *Clark* (*a*), *Machu* v. *The South Western Railway Company* (*b*), and *Beaulieu* v. *Finglam* (*c*).

Knowles and *R. Hall*, in support of the rule.—The true principle of all the cases is, that he who sustains an injury must proceed against the party who committed it, or those who employ him; and the question in these latter cases is, was the party who did the act the servant of the party causing the injury? And there is no distinction in this respect between fixed and moveable property, except, perhaps, in the former case, where the act complained of is a continuing nuisance: *Witte* v. *Hague* (*d*), *Allen* v. *Hayward* (*e*), *Burgess* v. *Gray* (*f*), *Milligan* v. *Wedge* (*g*), *Rex* v. *Watson* (*h*), *Parnaby* v. *The Lancaster Canal Company* (*i*), *Ramsden* v. *The Manchester South Junction and Altringham Railway Company* (*k*). [*Parke*, B.—If I grant a way leave to another, and in making it an accident occurs to a third party, am I liable?] The argument of the plaintiff would go to the extent of saying that you would be, which shows its fallacy.

Cur. adv. vult.

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THE facts of this case were precisely similar to *Reedie* v. *The London and North Western Railway Company*.

Martin and *H. Hill* shewed cause, and cited *Harrison* v. *Parker* (*l*).

(*a*) 8 Taunt. 602.
(*b*) Ante, Vol. 5, p. 302; *S. C.*, 2 Exch. 415.
(*c*) 2 Hen. 4, fol. 18, pl. 6.
(*d*) 2 D. & R. 33.
(*e*) 15 L. J., Q. B., 99.
(*f*) 1 C. B. 578.
(*g*) 12 A. & E. 737.
(*h*) 2 Ld. Raym. 66.
(*i*) Ante, Vol. 1, p. 696; *S. C.*, 11 A. & E. 230.
(*k*) Ante, Vol. 5, p. 552; *S. C.*, 1 Exch. 723.
(*l*) 6 East, 154.

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Knowles and *R. Hall*, contrà.

ROLFE, B., (after stating the pleadings and facts in *Reedie* v. *The North Western Railway Company*).—It appears to us quite clear that, after the passing of the second Act, the contract with Messrs. Crawshaw was transferred to the present defendants, so as to make them liable to the same extent precisely as the original Leeds, Dewsbury, and Manchester Company would have been, if the second Act had not passed. But, after full consideration of the subject, we are of opinion that neither the defendants nor the original Company are liable. In the case of *Quarman* v. *Burnett* this Court decided, adopting the opinion of Lord *Tenterden* and Mr. Justice *Littledale*, in *Laugher* v. *Pointer*, that the liability to make compensation for an injury arising from the neglect of a person driving a carriage attaches only on the driver or on the person employing him. The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim "*Qui facit per alium, facit per se.*" The party employing has the selection of the party employed; and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. The doctrine of *Quarman* v. *Burnett* has since been acted on in this Court in the case of *Rapson* v. *Cubitt*, and in the Court of Queen's Bench in *Milligan* v. *Wedge*, and again in *Allen* v. *Hayward*.

By these authorities we must consider the law to have been settled; and the only question is, whether the law, so settled, is applicable to the facts of this case.

To shew that it was not, it was argued, by the counsel for

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the plaintiff, that there is a recognised distinction on this subject between injuries arising from the careless or unskilful management of an animal or other personal chattel, and an injury resulting from the negligent management of fixed real property. In the latter case it was contended that the owner is responsible for all injuries to passers by or others, howsoever they may have been occasioned; and here it was said that the defendants were, at the time of the accident, the owners of the railway, and so are the parties responsible.

This distinction as to fixed real property is adverted to by Mr. Justice *Littledale* in his very able judgment in *Laugher* v. *Pointer* (*a*), and it is also noticed in the judgment of this Court in *Quarman* v. *Burnett*. But in neither of these cases was it necessary to decide whether such a distinction did or did not exist. The case of *Bush* v. *Steinman*, where the owner of a house was held liable for the act of a servant of a sub-contractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument, in support of the liability of the defendants, both in *Laugher* v. *Pointer* and *Quarman* v. *Burnett;* and as the circumstances of those two cases were such as not to make it necessary to overrule *Bush* v. *Steinman*, if any distinction in point of law did exist in cases like the present between fixed property and ordinary moveable chattels, it was right to notice the point. But on full consideration, we have come to the conclusion that there is no such distinction, unless perhaps in cases where the act complained of is such as to amount to a nuisance; and, in fact, that, according to the modern decisions, *Bush* v. *Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded.

(*a*) 5 B. & C. 559.

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It is not necessary to decide, whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him or part of his family. It may be, that in some cases he is so responsible. But then his liability must be founded on the principle, that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law "*Sic utere tuo ut alienum non lædas.*" This is referred to by Mr. Justice *Cresswell*, in delivering the judgment of the Court of Common Pleas in *Rich* v. *Basterfield* (*a*), as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed. And, possibly, on some such principle as this the case of *Bush* v. *Steinman* may be supported. But certainly that doctrine cannot be applied to the case now before us. The wrongful act here could not, in any possible sense, be treated as a nuisance. It was one single act of negligence, and in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property. If the defendants had employed a contractor carrying on an independent business, to repair their engines or carriages, and the contractor's workmen had negligently caused a heavy piece of iron to fall on a bystander, it would appear a strange doctrine to hold, that the defendants were re-

(*a*) 4 C. B. 802.

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sponsible. Mr. Justice *Littledale*, in his very able judgment in *Laugher* v. *Pointer* (*a*), observed, that the law does not recognise a several liability in two principals who are unconnected; if they are jointly liable, you may sue either, but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employment; and, applying the principle to the present case, it would be impossible to hold the present defendants liable without at the same time deciding that the contractors are not liable, which it would be impossible to be contended. It remains only to be observed, that in none of the more modern cases has the alleged distinction between real and personal property been admitted. In *Milligan* v. *Wedge*, Lord *Denman* expresses doubt as to the existence of such a distinction in any case; and in the more recent case of *Allen* v. *Hayward* the judgment of the Court proceeded expressly on the ground that the contractor, in a case like the present, is the only party responsible. The last case so closely resembles the present, that, even if we had not considered the decision right, we should probably have felt bound by it. But we see no reason to doubt its perfect correctness. It seems to follow as a necessary corollary from the principle of the preceding cases, and entirely to govern this.

Our attention was directed, during the argument, to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen; and so it was contended they must be responsible for their non-removal; but this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant. In *Quarman* v. *Burnett*, the

(*a*) 5 B. & C. 558.

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particular driver was selected by the defendants; but this was held not to affect the liability of the driver's master, or to create any responsibility in the defendants; and the same principle applies here. On these grounds, we are of opinion that this rule must be made absolute.

Rule absolute.

EXCHEQUER CHAMBER.

Trinity Vacation, 1849.

CHAPLIN *v.* CLARKE. *June 18th.*

In an action by an allottee of shares in a projected Railway Company, which had been abandoned, the plaintiff gave secondary evidence of the letter of allotment, but gave no evidence of any letter of application for shares, nor did it appear that there had been

THE principal facts of this case are stated ante, Vol. 5, p. 294(*a*). The plaintiff having elected to have a second trial, as provided by the rule, the cause was again tried before *Pollock*, C. B., at the London Sittings after Hilary Term, 1848, and this was a bill of exceptions to his Lordship's ruling. In addition to the evidence given on the former trial, the plaintiff gave secondary evidence of the letter of allotment, having previously proved that it was annexed to the cheque given to Messrs. Jones, Lloyd, & Co., the bankers, and that due search had been made for it without

any, though it was proved what was the usual form of such letters. The letter of allotment was headed "Not transferable." He then produced the banker's receipt, with a 20*s.* stamp on it; and then gave in evidence a letter from him to the defendant, stating that he had not received his shares, and requesting a return of his deposit, and an answer, "that every effort was being made to go to Parliament this Session." Nothing more took place:—*Held*, on a bill of exceptions, that it was not necessary that the plaintiff should have proved a letter of application; for if no letter of application was sent there was no written contract, because the letter of allotment would be the first writing, and that was only an assent to an offer by parol; that, if a letter of application was sent, there was a variance between the two documents, the words "not transferable" in the letter of allotment imposing a new term. *Secondly*, that the stamp was sufficient, within the 10th section of 55 Geo. 3, c. 184. *Thirdly*, that there was sufficient evidence of an abandonment of the scheme.

(*a*) *S. C.*, 1 Exch. 26.

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success. The letter of allotment was headed "Not transferable."

No letter of application for shares was produced, but the plaintiff shewed what was their usual form.

It was contended, on behalf of the defendant, *first*, that the letter of application for the shares ought to have been produced, as that document, with the letter of allotment, constituted the contract, and that they ought to have been stamped; *secondly*, that the acknowledgment given by Messrs. Jones, Lloyd, & Co., on the receipt of the deposit, required a stamp; *thirdly*, that there was not sufficient evidence of the abandonment of the scheme to entitle the plaintiff to recover. The learned Judge overruled all these objections, the defendant's counsel tendering a bill of exceptions. The plaintiff had a verdict.

Sir *F. Thesiger*, with whom was *Ogle*, for the plaintiff in error(*a*).—*First*, the application for shares, and the letter of allotment, constituted the contract, and ought both to have been produced: *Holt* v. *Squire*(*b*). In *Wontner* v. *Sharpe*(*c*), as also in *Vollans* v. *Fletcher* (*d*), the letter of application was in evidence; and as the allotment was not a simple acceptance of the application, but added the term "not transferable," it was held, that the letter of application was no part of the contract, but it would have been otherwise if the allotment had been conformable to the letter of application; that document, therefore, ought to have been produced: *Duke* v. *Andrews*(*e*), *Willey* v. *Parratt*(*f*). *Secondly*, the receipt given by Messrs. Jones, Lloyd, & Co. was not properly stamped: a receipt stamp was necessary;

(*a*) Before *Patteson*, J., *Coleridge*, J., *Coltman*, J., *Maule*, J., *Wightman*, J., *Cresswell*, J., *Erle*, J., and *Williams*, J.

(*b*) R. & M. 282.

(*c*) Ante, Vol. 4, p. 542; *S. C.*, 4 C. B. 404.

(*d*) Ante, Vol. 5, p. 73; *S. C.*, 1 Exch. 20.

(*e*) Ante, Vol. 5, p. 496; *S. C.*, 2 Exch. 290.

(*f*) Ante, p. 32; *S. C.*, 3 Exch. 211.

and the document does not come within the exemption of the Act. The money was not deposited "to be accounted for on demand" within 55 Geo. 3, c. 184, Sched. tit. "Receipt." The money also is expressed to be received of another person than the person to whom the same is to be accountable. *Thirdly*, there was no evidence that the project was abandoned. The letter of the 17th of February, 1842, (ante, Vol. 5, p. 295,) is no sufficient evidence of that fact.

Willes, for the defendant in error.—*First*, there was sufficient evidence of the contract. The banker's receipt and the letter of the 8th of February, 1842, (ante, Vol. 5, p. 295,) with the letter of allotment, shew sufficiently what the contract was. There does not appear that there was a letter of application for shares, but, if there was, it was in the usual form; and inasmuch as that would differ from the letter of allotment by reason of the addition of the term "not transferable," it would be no part of the contract, and thus bring the case within those of *Duke* v. *Andrews* (*a*), *Vollans* v. *Fletcher* (*b*), *Willey* v. *Parratt* (*c*), *Winch* v. *Keeley* (*d*), *Dangerfield* v. *Thomas* (*e*). The *second* point has been already decided by *Clarke* v. *Chaplin* (*f*). *Thirdly*, there was clear evidence of an abandonment, for there was not sufficient deposits to enable the directors even to apply to Parliament. [He cited *Walstab* v. *Spottiswoode* (*g*) and *Nockels* v. *Crosby* (*h*).]

Sir *F. Thesiger*, in reply, cited *Crisp* v. *Anderson* (*i*), *Roe* v. *Castle Morton* (*k*), and *Rippiner* v. *Wright* (*l*).

(*a*) Ante, Vol. 5, p. 496; *S. C.*, 2 Exch. 290.
(*b*) Ante, Vol. 5, p. 73; 1 Exch. 20.
(*c*) Ante, p. 32; 3 Exch. 211.
(*d*) 1 T. R. 619.
(*e*) 9 A. & E. 292.
(*f*) Ante, Vol. 5, p. 294; *S. C.*, 1 Exch. 26.
(*g*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.
(*h*) 3 B. & C. 814.
(*i*) 1 Stark. 35.
(*k*) 3 B. & Ald. 588.
(*l*) 2 B. & Ald. 478.

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PATTESON, J.—We are of opinion that the ruling of the Lord Chief Baron was right. It was proved by the plaintiff, that the deposit was paid upon some contract, for he gave secondary evidence, as he was entitled to do, of the letter of allotment. It was then shewn what was the usual form of a letter of application, but the plaintiff did not prove that any such letter was sent. If no letter of application was sent, there was no written contract, because the letter of allotment was the first writing, and that was only an assent to an offer by parol. If a letter of application was sent, there was a variance in the terms of the two documents; for the Court of Exchequer has decided, that the words "not transferable" in a letter of allotment, impose a new term, and in that decision we entirely concur. Then it is said, that the document given by the bankers, on the receipt of the deposit, required a receipt stamp. It is not necessary to decide whether that document was an accountable receipt, within the exemption of the 55 Geo. 3, c. 184; because, assuming it is, it is clear that, by the 10th section of that Act, where a document is not required to be stamped with a stamp of a particular denomination, it is sufficient if any stamp be impressed, provided it be of the right amount, and is not specifically appropriated to any other instrument. The remaining question is, whether the plaintiff is entitled to recover, as upon a failure of consideration. It appears, that in the year 1841 the money was paid, and the plaintiff wrote a letter, saying that he had never received the shares upon the faith of which he had paid his money. In February, 1842, an answer was returned to that letter, stating, that efforts were being made to go to Parliament that session, and nothing more takes place until the present action is brought. The defendant was one of the directors, whose duty it was to intimate that some further step had been taken, if there had been any in fact. But though the plaintiff complained that he had paid his money, and could

not get his shares, nothing further takes place. It seems clear to us that there was a failure of consideration, and that the ruling of the Lord Chief Baron was right.

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Judgment affirmed.

COURT OF QUEEN'S BENCH.

Trinity Term, 1849.

In Re THE SOUTH WALES RAILWAY COMPANY v. RICHARDS.

June 8th. & July 5th.

A jury having been impanelled under the Lands Clauses Consolidation Act, 8 Vict. c. 18, to assess the amount of compensation to be paid to a landowner for land compulsorily taken, and other lands injuriously affected by severance, &c., the landowner claimed the expense of erecting a bridge to connect his premises with the highway, which was severed by the line. The jury found a gross sum for the purchase of the lands required by the Company, a sum for severance, and a sum "for severance owing to the crossing, and the expense incurred thereby." Evidence was given that this last sum would be the cost of the bridge:—*Held*, that the jury were not warranted in awarding the latter sum, inasmuch as that was a matter for the adjudication of justices under 8 Vict. c. 20, s. 69; and as this was an excess of jurisdiction, a certiorari would lie to remove the proceedings, notwithstanding sect. 145 of 8 Vict. c. 18, which takes away that writ.

THIS was a rule calling upon Mr. Walter Richards to shew cause why a certiorari should not issue to remove into this Court the proceedings had before the Sheriff of Glamorganshire to settle the amount of compensation to be paid by the South Wales Railway Company to Mr. Richards, under the Lands Clauses Consolidation Act, 8 Vict. c. 18. The rule was moved for upon affidavits, from which it appeared that the line of the railway when made would cross an occupation road leading from Mr. Richards' residence to the high road. It had been a matter of controversy between him and the Company, in what way this communication with the high road should be made, he claiming that a bridge should be thrown over the railway, they alleging that he might safely and conveniently cross it on a level. The parties having come to no agreement Mr. Richards sent in his claim to the Company, under the

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Lands Clauses Consolidation Act, and thereby claimed compensation in respect of land purchased from him by the Company, and also in respect of the severance of land from other land belonging to him, and also for injuriously affecting the said lands by the execution of the railway and other works authorised by the Act. No agreement having been come to as to the amount of compensation, the Company issued their warrant to the Sheriff, before whom, and a jury, the inquiry took place. At the inquiry Mr. Richards claimed the expense of making a proper communication from his residence to the high road, and gave some evidence to show that a bridge would be necessary for that purpose, and that the expense of erecting it would be 450*l.* On behalf of the Company it was contended, that that was a matter for which the jury was not entitled to give compensation, but that the claimant must proceed before two justices, under 8 Vict. c. 20, s. 69 (*a*). The

(*a*) Sect. 68 enacts, that "the Company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway; that is to say—Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of, or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof. Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway; together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be. Also all necessary arches, tunnels, culverts, drains, or other passages, either over or under, or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may

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under-sheriff concurred in the latter view, and told the jury that the Company would have to make the proper communications between the two parts of the estate, and that, in case of dispute, the number and kind of such communications would be settled by justices. The jury gave the following written verdict:—

"Verdict for the plaintiff, Mr. W. Richards.

Value of the land purchased, and compulsory possession . .	£305	0	0
Severage on 13½ acres, 30 years' purchase	157	10	0
Loss of water, 25 acres, at 3*s.*, 30 years' purchase . . .	112	10	0
Severance owing to the crossing, and expense incurred thereby .	450	0	0
	£1025	0	0"

June 8th.

Crompton now shewed cause(*a*), and contended, that,

be; and such works shall be made from time to time as the railway works proceed. Also proper watering places for cattle, where, by reason of the railway, the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering places; and such watering places shall be so made as to be at all times as sufficiently supplied with water as theretofore, and as if the railway had not been made, or as nearly so as may be; and the Company shall make all necessary watercourses and drains for the purpose of conveying water to the said watering places. Provided always, that the Company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

Sect. 69 enacts, that, "if any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by two justices; and such justices shall also appoint the time within which such works shall be commenced and executed by the Company."

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., and *Erle*, J.

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as Mr. Richards claimed the expense of a communication from his property to the high road, and not between two parts of his land severed by the railway, the 8 Vict. c. 20, s. 69, was not applicable, and therefore that the verdict was correct. *Secondly*, that, as there was not a total absence of jurisdiction, the certiorari was, by 8 Vict. c. 18, s. 145, taken away. He cited *Rex* v. *Casson* (*a*), *Rex* v. *Fowler* (*b*), *Rex* v. *Saunders* (*c*), *Reg.* v. *The Sheffield and Manchester Railway Company* (*d*), *Reg* v. *The Bristol and Exeter Railway Company* (*e*), *Reg.* v. *The Lancaster and Preston Junction Railway Company* (*f*), *Reg.* v. *The Cheltenham Paving Commissioners* (*g*).

Sir *F. Kelly*, *Watson*, and *Peacock*, in support of the rule, contended that the item for severance was one in which the jury had no jurisdiction, and therefore that the certiorari was not taken away: *Jubb* v. *The Hull Dock Company* (*h*), *Stanley* v. *The South Western Railway Company* (*i*); that there was nothing to prevent the claimant from going before two magistrates, under 8 Vict. c. 20, s. 68, and again claiming compensation for the severance.

July 5th. The judgment of the Court was now delivered by

COLERIDGE, J.—This was a rule for a certiorari to remove the proceedings had before the Sheriff of Glamorganshire and a common jury, in order to settle the amount of compensation to be paid by the South Wales Railway Company to Walter Richards. It was admitted that the writ was taken away as to all proceedings, whether under the Lands Clauses Consolidation Act (8 Vict. c. 18), or the Railways Clauses Consolidation Act (8 Vict. c. 20); the rule,

(*a*) 3 D. & R. 36.
(*b*) 1 A. & E. 837.
(*c*) 5 D. & R. 611.
(*d*) Ante, Vol. 1, p. 537; *S. C.*, 11 A. & E. 194.
(*e*) Id., p. 202.
(*f*) Ante, Vol. 3, p. 725; *S. C.*, 6 Q. B. 759.
(*g*) 1 Q. B. 467.
(*h*) 9 Q. B. 443.
(*i*) Q. B., 30th Jan. 1849.

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therefore, cannot be made absolute, unless it distinctly appears, that in the proceedings the Sheriff and jury have taken upon themselves to decide on a matter over which they have no jurisdiction. Where that is made out, the statutory prohibition does not apply, and the inherent jurisdiction of this Court is unrestrained; nor need the excess of jurisdiction in the Court below appear in every part of the proceedings, for it cannot give validity to one act, in itself beyond the power of the Court, whilst it has at the same time done another act which it was competent for it to do. There is, however, a great disposition to evade clauses in Acts of Parliament which take away the certiorari on the alleged excess of jurisdiction, and we feel bound not to yield to attempts of this kind, unless they rest on very clear and satisfactory grounds.

In the present case, then, we are first to inquire what it is that the Sheriff's jury have done. The warrant has not been set out in terms in the affidavits, but the claim is stated to have been in respect of the purchase of land, for damage to other lands of the claimant by the severance of the purchased land from them, and for the injuriously affecting such other lands by the execution of the railway and works. It appears that the line of the railway when made will cross what is called an occupation road by which the claimant and his family go from the house, his residence, to the high road, and will cross it on a level; and it further appears that it had been matter of controversy between him and the Company, in what way his communication with the high road should be made, he claiming that a bridge should be thrown over the railway, they alleging that he might safely and conveniently cross on a level. On the inquiry before the jury the principle on which compensation should be assessed would be of course discussed; and though the evidence is not perfectly clear, we collect that, on the one hand, it was argued that the jury should allow for the expense of providing such a

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mode of crossing as might be necessary, and that a bridge would be necessary; and on the other, that the jury should not take the matter into their consideration at all, because the subject of communication between several parts of the same property was entirely for the decision of another tribunal, namely, two justices of the peace. The under-sheriff, adopting the latter view of the case, told the jury that the Company would have to make the proper communications between the two parts of the estate, and that, in case of dispute, the number and kind of such communications would be settled by justices of the peace. The jury retired, and returned with a written verdict in the following terms. [His Lordship read the verdict, ante, p. 199.] Without resorting to the statements of what was said by the foreman,—as to which the affidavits are not agreed in terms, though they do not differ much in substance,—we think it clear, that under this last item the jury have given not merely a compensation for the injury to the lands unpurchased, by severance, which injury would have been an accessary to the taking of the lands purchased, and properly to have been considered by the jury under the Lands Clauses Consolidation Act, for they have given a distinct sum for that, estimating it as a continuing injury, by so many years' purchase; but they have given besides, and in a gross sum, what they consider sufficient to enable the claimant entirely to remove an existing inconvenience, in providing a proper mode, which they leave to him to choose and to execute, for the communication between the two parts of the estate. The language is unequivocal; the money is given for the severance, owing to or in consequence of the crossing, that is, the crossing of the railway, and the expense which will be incurred thereby.

The question then remaining is, whether in so doing they have exceeded their jurisdiction; and it appears to us that they have. The legislature has clearly made a distinction between the two things, and they have classed the

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former with the purchase of lands, and have made it the subject-matter of pecuniary compensation, because in its nature it must be often incapable of being done away with, or compensated in kind,—the latter they have provided for by the Railways Clauses Consolidation Act, as among the things to be done by the Railway Company itself in the course of the construction of the railway; and this on reasonable grounds, because the undertakers are bound to construct their line with as little permanent inconvenience to the adjoining lands as they can, because the thing must be done with reference to the interest and convenience of the public and the Company as well as of the landowner; and because it is to be presumed that the Company have the means of accomplishing the object more economically, skilfully, and effectually and speedily, than the landowner. It is true that the clauses under which provision is made for effecting this is prefaced by the words "works for the accommodation of the owners and occupiers of lands adjoining the railway;" and it was said Mr. Richards may want no work. He may be content to cross the railway on a level as he can, and provide for his own safety in doing so; but the clauses are not limited to what might probably be called works; "gates, bridges, arches, culverts, and passages" are the words used, and the object is stated to be, the making good any interruptions caused by the railway to the use of the lands through which the railway shall be made. "All such works," in this large sense, the Company are to make, and at all times thereafter to maintain, with a provision, indeed, for their being made by the landowner, in the Company's default; and if the two parties cannot agree as to the nature and extent of the accommodation required, two justices are to determine between them. The jury in the present instance have taken on themselves to inquire into this matter; they have not indeed done what the Act requires justices to do, which indeed, from the nature of things, they could not; but they have, in

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spite of the directions of the under-sheriff, to which, in such a matter, they were bound to have listened, given a substituted pecuniary compensation for it, which the Act nowhere authorises to be given by any one. This is a clear excess of jurisdiction in a substantial matter, which, in the present instance, probably may operate unfairly on the Company, and probably, as a precedent, might in many others, if allowed to pass unchecked, lead to great practical injustice. It is to be clearly understood that we are not prejudging the question, whether a bridge is necessary or not, nor the extent of inconvenience sustained by Mr. Richards, or the prejudice to his property, unless he has a proper communication across the railway from one part of it to another; nor even, if with a bridge, he still sustains inconvenience from the severance; we are merely directing him to the proper tribunal, and securing to the railway, and to the public, that such communication shall be made by the proper parties to make it. If he has a right to the bridge, it is to be presumed that the Company will be compelled to make it; if they are not directed to do so, it is to be presumed that he has no just claim to such a mode of communication. The writ, therefore, must go; but, as the proceeding was well commenced, and as in three particulars out of four it has been properly conducted, and the fourth can be certainly and distinctly separated from the rest, owing to the verdict having been special and in writing, we should not think it necessary to quash the whole, if the claimant were content to let it stand for the unobjectionable parts. This suggestion may perhaps lead to an arrangement, and to an amendment of the verdict by consent, otherwise the rule must be absolute.

Rule absolute accordingly.

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COURT OF EXCHEQUER.

Michaelmas Vacation, 1849.

THE MIDLAND GREAT WESTERN RAILWAY COMPANY OF IRELAND *v.* EVANS. *Dec. 5th.*

Debt for calls.—The declaration stated, that the defendant, on &c., was and from thence hitherto *hath been and still* is the holder of forty shares in the said Company, and then and at the time of the commencement of this suit was *and still* is indebted to the Company &c., whereby an action hath accrued to the Company by virtue of the Companies Clauses Consolidation Act, and also by virtue of the Midland Great Western Railway of Ireland Act, 1845, to demand &c.:—*Held* good on special demurrer, though not comformable with 8 Vict. c. 16, s. 26.

DEBT for calls.—The declaration stated, that the defendant, on the 27th of November, 1848, was and from thence hitherto *hath been and still* is the holder of forty shares in the said Company; and then, and at the time of the commencement of this suit, was *and still* is indebted to the Company in 300*l.* in respect of calls, whereby an action hath accrued to the said Company by virtue of the Companies Clauses Consolidation Act, and also by virtue of the Midland Great Western Railway of Ireland Act, 1845, and of the Midland Great Western Railway of Ireland Act, (Mullingar to Athlone), 1846, to demand of the defendant the said sum of 300*l.*, &c.

The defendant demurred specially, assigning for causes that there is no allegation that the defendant was the holder of the shares at the time when the calls were made; that the plaintiffs have attempted to put in issue immaterial matters, such as, whether the defendant was the holder of the shares at the commencement of the suit; that the count is bad, in averring that an action hath accrued by virtue of several Acts of Parliament, there being no facts stated from which the Court can draw any such conclusion; and that the declaration is not in accordance with the form given by the first mentioned Act.

Rochford Clarke, in support of the demurrer.—The declaration is bad, as being a departure from the statutory

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THE MIDLAND GREAT WESTERN RAILWAY CO. OF IRELAND v. EVANS.

form given by 8 Vict. c. 16, s. 26 (*a*). It is also bad because it states, that, by virtue of the general Act and the special Acts, the cause of action has arisen. [He cited *The Belfast and County Down Railway Company* v. *Strange* (*b*), *Shaw* v. *Holland* (*c*), *Moore* v. *The Metropolitan Sewage Company* (*d*), *Leaf* v. *Robson* (*e*), *Williamson* v. *Allison* (*f*), *Lee* v. *Clarke* (*g*), and *Fisher* v. *Gibbon* (*h*).]

Edward James, contrà, was stopped by the Court.

ALDERSON, B., delivered the judgment of the Court, and said:—In this case the Court is of opinion that the demurrer must be overruled. Two objections were made, which in substance were the same; *first*, that the party had not followed the form in the general Act, and that it is not correct so to describe the effect of that and the special Acts of Parliament. The 26th section of the 8 Vict. c. 16, provides that certain requisites shall be stated in the declaration; those requisites are stated, but there is an addition, which was unnecessary—that, "before the commencement of the suit, and from thence hitherto, the defendant hath been and still is the holder of divers, to wit, forty shares." It would have been sufficient, and perhaps better, to have stated only, that the defendant was such holder of forty shares. This declaration states something besides, the utmost effect to be given to which is, that the declaration is in some degree subject to the objection of surplusage; which, however, cannot be taken advantage of. With respect to the last point, the declaration states, that, by virtue of the particular Act, that is, the general Act, and also by virtue of two particular Acts, the special Acts, the Company is entitled to a right of action. It appears that there was an Act of Parliament passed for incorporating the Company,

(*a*) See this section, post, p. 212.
(*b*) Ante, Vol. 5, p. 548; *S. C.*, 1 Exch. 739.
(*c*) Ante, Vol. 4, p. 150; *S. C.*, 15 M. & W. 136.
(*d*) 3 Exch. 333.
(*e*) 13 M. & W. 651.
(*f*) 2 East, 446.
(*g*) Ibid. 333.
(*h*) 2 D. & L. 869.

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and that there was a second Act for enlarging its powers, and under the second Act, a power of making calls for the purposes of the enlarged powers. It seems to us that it is correctly stated, and that the difficulty, very properly put to us, in respect of the interpretation clause, is solved by looking at the 26th section of the Act, which speaks of the special Acts, clearly referring to all the Acts under which the calls may be made; therefore, it appears that the declaration is correctly framed: but even if it were not so, the answer would be the same as to the form, namely, that it is surplusage. There will, therefore, be judgment for the plaintiffs.

Judgment for the plaintiffs (*a*).

(*a*) See next case; and see *The Irish South Eastern Railway Company* v. *Clarkson*, Q. B., Jan. 1851.

COURT OF EXCHEQUER.

Hilary Term, 1850.

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Jan. 18*th* (*a*).

THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE, JUNCTION RAILWAY COMPANY *v.* WEBSTER.

IN this case it was decided, that the statutory form of declaration prescribed by 8 Vict. c. 16, s. 26, is good on special demurrer. See the case reported 19 L. J., Exch., 146.

Willes, in support of the demurrer.

Welsby, contrà.

(*a*) Before *Pollock*, C.B., *Parke*, B., *Alderson*, B., and *Platt*, B.

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COURT OF EXCHEQUER.

Hilary Term, 1850.

Jan. 12*th.*

MACGREGOR *v.* KEILEY.

Where the affairs of a Railway Company have been referred to the Master under the Winding-up Acts, the Court will stay proceedings against one of the provisional committee for a debt due by the Company, until the plaintiff shall have proved his claim before the Master, though the application be not made until after execution.

CORRIE moved(*a*), on behalf of the defendants, for a rule calling upon the plaintiff to shew cause why all proceedings in this action should not be stayed until after proof, or exhibiting such proof, as the plaintiff might be able to give of his debt before the Master appointed for winding up the affairs of the Midland Grand Junction Railway Company, pursuant to 11 & 12 Vict. c. 45.

From the affidavits it appeared that the plaintiff had been employed as the solicitor of the Company, which was provisionally registered, and of which the defendant was a provisional committee-man; and that the action was brought to recover the amount of his bill for professional services rendered to the Company. At the trial of the cause the plaintiff had a verdict for 320*l.*, for which, with the costs, judgment was entered up; a ca. sa. was subsequently issued against the defendant for those costs, and thereupon he was arrested, but on the 29th of June discharged under a Judge's order. A rule nisi was afterwards obtained to rescind that order, which was enlarged to the present term. It further appeared, that, in November, 1849, an order was obtained for winding up the affairs of the Company, under the 11 & 12 Vict. c. 45, and an official manager had been appointed. The affidavit further stated, that the defendant believed himself liable to be called upon as a contributory under the Act.

(*a*) Before *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.

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Corrie contended, that, as the affairs of the Company were being wound up by the Master, under the order, the proceedings in the action should be stayed, the plaintiff being a "creditor" and the defendant a contributory within the 3rd section of 11 & 12 Vict. c. 45, and that the plaintiff ought, under the 73rd section (*a*) of that statute, to be restrained from proceeding in the action. [*Alderson*, B.—The services may have been done for the Railway Company on the credit of the provisional committee-men, and in that case the question is, is it the debt of the Company? It lies upon you to show that it is.] It is submitted, that that appears from the affidavits. The judgment of *Parke*, B., in *Thompson* v. *The Universal Salvage Company* (*b*) is conclusive of this case. He says, "The 11 & 12 Vict. c. 45, puts the affairs of an insolvent Company in a different position, and directs them to be administered under a Master in Chancery, who is to collect the effects of the Company, and is empowered to apply to each individual shareholder liable to contribute, and thus to provide a fund for the payment of the partnership debts; therefore, we must see what is the construction of the 73rd section of that Act; and the effect of it appears to me to be, that all persons having debts against an insolvent Company, instead of suing the Company, must, in the first instance, prove their debts under that statute, and, having proved,

(*a*) Which enacts, "That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to *proceed* with any action against the official manager, or against the Company or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master."

(*b*) Ante, p. 15; *S. C.*, 3 Exch. 310.

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they are entitled to be paid. That mode of obtaining satisfaction is substituted by that statute for the direct remedy given by the former one; but if that should prove abortive, this Court will, in the exercise of its discretion, give leave to the creditor to proceed directly against the persons liable to contribute towards the debts of the Company; but, according to the true construction of the 7 & 8 Vict. c. 110, and the 11 & 12 Vict. c. 45, so long as there is a reasonable prospect of obtaining payment by means of the last-mentioned statute, it is our duty to prevent individual creditors being called on to make good the debts of the Company. We ought, therefore, to stay proceedings where any execution has actually issued; and consequently, we should now prevent this execution from issuing."

Willes shewed cause in the first instance.—*First*, the debt sued for is not a debt of the Company, as the result of the action has shewn. The Company never obtained an Act, and therefore this case must be governed by *Walstab* v. *Spottiswoode* (*a*). *Secondly*, the 73rd section of the 11 & 12 Vict. c. 45, does not apply to a case where judgment has been recovered as in this case, for that judgment cannot be proved against the Company; and supposing that it could, the costs, for which the defendant has been arrested, could not. He cited *Marson* v. *Lund* (*b*).

Corrie, in reply.

POLLOCK, C. B.—This rule must be made absolute. The affidavits disclose sufficient to satisfy us that this is a debt of the Company, and that fact is not denied by the plaintiff. The proceedings must therefore be stayed, until the plaintiff has gone before the Master.

PARKE, B.—I am of the same opinion. I think that this case is within the Winding-up Act, provided the

(*a*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.
(*b*) In the Queen' Bench, post.

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debt is one for which the Company is liable, and not the defendant individually. The debt is sworn to be one of the Company, and that fact is not denied; and, indeed, there is abundant evidence of that fact on the affidavits. Then the 73rd section applies to this case; and on the authority of the case of *Thompson* v. *The Universal Salvage Company*, which I think was properly decided, this rule must be made absolute.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute (*a*).

(*a*) See *Prescott* v. *Hadow*, post.

COURT OF EXCHEQUER.

Easter Term, 1850.

THE BIRKENHEAD, LANCASHIRE AND CHESHIRE JUNCTION RAILWAY COMPANY *v.* COTESWORTH and Others. *April 19th.*

DEBT for calls in the statutory form (8 & 9 Vict. c. 16, s. 26).

The executors of a shareholder are not liable in an action for calls in the statutory form under the Companies Clauses Consolidation Act, when the call is made in the lifetime of the testator.

Pleas, *first*, never indebted; *secondly*, that the defendants were not nor are the holders of the shares.

The cause was tried at the Chester Spring Assizes, 1850, before *Cresswell*, J., when it appeared that the defendants were the executors of J. Gilfillan, who appeared on the register as the owner of the shares. The calls were made in February and August, 1849, after the death of Gilfillan. The will was proved by Cotesworth, power being reserved to the other defendants to come in afterwards.

It was contended at the trial, on behalf of the defendants, that, if the defendants were liable at all, they were

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THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY CO. v. COTESWORTH.

not as executors liable in this form of action. The learned Judge was of that opinion, and nonsuited the plaintiffs, giving them leave to move to set aside the nonsuit and to enter the verdict for them.

Welsby now moved (*a*).—The form of declaration given by the 26th section (*b*) of 8 & 9 Vict. c. 16, is applicable to a case where the calls become due in the testator's lifetime.

(*a*) Before *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

(*b*) Which enacts, that, "in any action or suit to be brought by the Company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the Company to declare that the defendant is the holder of one share or more in the Company (stating the number of shares), and is indebted to the Company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the Company by virtue of this and the special Act."

The following sections were also referred to and relied upon:—

Sect. 21. "The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company; and with respect to the provisions herein or in the special Act contained for enforcing the payment of calls, the word "shareholder" shall extend to and include the legal personal representatives of such shareholder."

Sect. 27. "On the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special Act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the Company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

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That section must be read with the 21st; then it will appear that the term "shareholder" is applicable to the legal personal representative of a shareholder. [*Parke*, B.—You must also look at the 27th section. The defendants are liable only as executors, and there is no statement on these pleadings that they are sued as such.] If that be necessary, the 21st section becomes of no practical effect. [*Parke*, B.—The meaning of that section is, that the executors shall be liable on the shares of their testator; but it has no application to a case like this. Perhaps the legislature intended by that clause, that, as long as the executor holds shares, he shall be liable for calls whether he has funds or not. According to the argument contended for, there would be two sets of shareholders of the same shares at the same time,—the testator and the executors,—which cannot be.]

POLLOCK, C. B.—I think that the nonsuit was right. There will therefore be no rule.

PARKE, B.—I am of the same opinion. It cannot be contended that the defendants were shareholders at the time when the calls were made. Therefore, the 26th section, under which this declaration is framed, is altogether inapplicable to the present case. As to the 21st section, I think that the words "legal representatives" in that section apply to executors who are in the possession of shares, and make them liable for calls upon those shares. But at all events, that section does not make the testator and his executors shareholders of the same share at the same time. I therefore think that the form of the declaration is wrong, and that the action is not maintainable.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

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May 1*st*.

EAST LANCASHIRE RAILWAY COMPANY *v.* CROXTON.

Debt for calls.—The declaration stated, that the defendant, at the time of the making of the calls, *was and still is* the holder of thirty-nine shares, &c., and *was and still is* indebted to the Company &c.:—*Held* good on special demurrer, though not conformable with 8 Vict. c. 16, s. 26.

DEBT for calls.—The declaration stated, that the defendant, at the time of the making of the calls hereinafter mentioned, *was and still is* the holder of thirty-nine shares in the said Company, and, before the commencement of this suit, *was and still is* indebted to the said Company in 195*l*., parcel of the sum above demanded, in respect of two calls upon each of the said shares, theretofore duly made by the said Company, each of the said calls being of the sum of 2*l*. 10*s*. upon each of the said shares; whereby, actio accrevit, &c.

Special demurrer.

Hugh Hill, in support of the demurrer (*a*), cited the following cases: *The Belfast and County Down Railway Company* v. *Strange* (*b*), *The Newport, Abergavenny, and Hereford Railway Company* v. *Hawes* (*c*), and *Moore* v. *The Metropolitan Sewage Manure Company* (*d*).

Gray, contrà, cited *The Midland Great Western Railway Company of Ireland* v. *Evans* (*e*), and *Bristow* v. *Wright* (*f*).

Hill, in reply.

POLLOCK, C. B.—The same objection as is now raised was taken in the case of *The Midland Great Western Railway Company of Ireland* v. *Evans*, and overruled, after time taken by the Court to consider it. Here the objection,

(*a*) Before *Pollock*, C. B., *Rolfe*, B., and *Platt*, B. The argument is omitted, as it followed that of *The Midland Great Western Railway Company* v. *Evans*, ante, p. 205.

(*b*) Ante, Vol. 5, p. 548; *S. C.*, 1 Exch. 739.

(*c*) 3 Exch. 476.

(*d*) 3 Exch. 333.

(*e*) Ante, p. 205.

(*f*) Dougl. 640.

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THE EAST LANCASHIRE RAILWAY CO. v. CROXTON.

though not precisely the same, is so in spirit. There is stated in this declaration all that the statute requires, and something more, which may be struck out as surplusage.

ROLFE, B.—I am of the same opinion; I think that this declaration is good, and that it must be governed by the case referred to. I had some doubt at first whether there might not be a distinction, but I now think that the principle is the same in both cases. Here the objection is, that the words "was and still is" are added; and there is some plausibility in saying that the addition of the word "still" gives a different meaning; but in *The Midland Great Western Railway Company of Ireland* v. *Evans* the allegation was, that "the defendant, before the commencement of the suit, was and from thence hitherto hath been and still is" &c., which was open to the same objection. Here the word "is" means at the time of the call, and the rest may be rejected as surplusage.

PLATT, B.—I am of the same opinion.

Judgment for the plaintiffs.

BAIL COURT.

Trinity Term, 1850.

BIRCH and Another *v.* LOWNDES. *June* 10*th*.

Judgment as in case of a nonsuit will not be given against a member of a provisional committee of a public Company, where proceedings are pending under the 11 & 12 Vict. c. 45, for winding up the affairs of the Company, unless the plaintiff has been guilty of neglect in going before the Master to prove his claim.

THIS was a rule calling upon the plaintiffs to shew cause why judgment as in case of a nonsuit should not be given for the defendant.

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Montague Smith, now shewed cause (*a*), with an affidavit, by which it appeared that the action was brought against the defendant as a member of the provisional committee of the London, Birmingham, and Buckingamshire Railway Company, in respect of a claim by the plaintiffs against the Company, or the provisional committee thereof, for professional services performed by them. The cause having been made a special jury cause, at the instance of the defendant, was not taken at the Middlesex Sittings after Trinity Term, 1849, but was made a remanet to the Sittings after Michaelmas Term in the same year, and subsequently to the Sittings after Hilary Term, 1850. In November, 1849, the defendant presented a petition to the Court of Chancery, praying that the affairs of the Company might be wound up under the Joint-stock Companies Winding-up Act, 1848. In the same month, a Mr. Waddy presented a similar petition, upon which, on the 23rd of that month, the Vice-Chancellor made an order for dissolving and winding up the Company. On the 4th of December, the defendant took out a summons calling upon the plaintiffs to shew cause why all further proceedings should not be stayed until after the plaintiffs should have proved their debt before the Master under the order for dissolution; but, inasmuch as no official assignee had been appointed, the defendant abandoned the summons. Before the Sittings after Hilary Term, 1850 (but how long before, the affidavit did not state), an official manager was appointed. On the 1st of February, notice was given to the defendant that the plaintiffs had, in consequence of the appointment of an official manager, withdrawn the record, and would carry in their claim before the Master. On the 10th of April an affidavit was accordingly made by one of the plaintiffs, of the truth of their claim, that for which the action was brought, carried in before the

(*a*) Before *Wightman*, J.

Master, and due notice thereof was given to the official manager. No further proceedings had been taken up to the present time.

Montague Smith contended, that the proceedings that had taken place, and the 73rd section of the 11 & 12 Vict. c. 45 (*a*), precluded the plaintiffs from proceeding in the action; and, as the defendant was a petitioner for the order, he was estopped from making the present application: *Partridge* v. *Salter* (*b*).

Manisty, in support of the rule, contended, that the 73rd section of the 11 & 12 Vict. c. 45, was not compulsory, but only required that a plaintiff should first prove before the Master, and that the facts relied upon furnished no excuse for not proceeding to trial.

Cur. adv. vult.

WIGHTMAN, J.—The difficulty imposed upon the Court by the section is, that it may be said, if the present answer be good, it may be set up in every case where similar proceedings have been taken, and the plaintiff does not choose to go in at any time, being unable to prove any claim before the Master.

In cases of this sort, however, everything will turn upon the dates. Unfortunately it does not appear when the official manager was appointed, and it may be that it was

(*a*) Which enacts, "That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager, or against the Company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master.

(*b*) 5 Dowl. 68.

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so short a time before the record was withdrawn that it might be unreasonable to expect the plaintiffs to go before the Master on so brief a notice; therefore, there is no ground for saying, that, in discharging this rule, I am deciding that a party need not go before the Master, where it is shewn that he has had reasonable time to do so. A party cannot, by refusing to prove his claim, prevent the defendant from moving for judgment as in case of a nonsuit. At present it does not appear that there was any unreasonable delay on the part of the plaintiffs. It becomes then, I think, the ordinary case, in which the plaintiff shews that he had a reasonable excuse for not proceeding to trial. The rule must therefore be discharged. If there be another default, there is no reason that there should not be another application. If it had appeared that the official manager had been appointed early in January, I think the plaintiffs would have been bound to go before the Master and prove their claim.

Rule discharged.

COURT OF EXCHEQUER.

Trinity Term, 1850.

June 1st.

AMBERGATE, NOTTINGHAM, AND BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY *v.* COULTHARD.

An action of debt will not lie for a call payable by instalments, until all of the instalments are due. *Semble*, that a call payable by instalments is bad.

DEBT for calls.—The declaration stated, that the defendant is the holder of twenty shares in the said Company, and is indebted to the said Company in 12*l.* 10*s.* in respect of a call of 12*s.* 6*d.* upon each of the said shares, (stating two other calls,) and in the sum of 35*l.* in respect of a certain other call of 1*l.* 15*s.* per share &c. .made on the 11th of January, 1849, &c.

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AMBERGATE, NOTTINGHAM, AND BOSTON, AND EASTERN JUNCTION RAILWAY CO. v. COULTHARD.

Pleas, *first*, that the defendant is not a holder of the shares; *second*, never indebted.

The cause was tried before *Pollock*, C. B., at the Sittings for Middlesex after Hilary Term last, when it appeared that the defendant was a holder of twenty shares in the Company, and that the action was brought to recover 49*l.* 10*s.*, being the amount of four several calls made by the Company. On the first three calls no question arose. On the fourth call, which was made on the 11th of January, 1849, the plaintiffs sought to recover 15*l.*, being an instalment of 15*s.* per share, payable on the 28th of February, 1849, on a call of 1*l.* 15*s.* per share. The call was proved by the secretary of the Company. It was to the effect stated in the following notice, which was proved to have been sent to the defendant:—

"Ambergate, Nottingham, and Boston, and Eastern Junction Railway.

"Fourth Call.

"No. 253. Nottingham, 11th January.

"To Joseph Coulthard, Esq., &c.

"Sir,—I beg to inform you that the Directors of the above-named Company have this day made a call of 1*l.* 15*s.* per Share, payable by two instalments (that is to say, 15*s.* per Share on the 28th day of February next, and 1*l.* per Share on the 7th of May next).

"You are therefore requested to pay the amount on the Shares held by you at any of the under-mentioned Banks, on or before the above-named days, at the same time producing this Call letter.

"Interest at 5*l.* per cent. per annum will be charged by the bankers if the money is not paid when due. No transfer of Shares can be allowed until all calls made thereon are paid.

"I am, Sir, your obedient servant,

"JOHN GOUGH, Secretary.

"Call on 20 Shares, 35*l.*

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they are entitled to be paid. That mode of obtaining satisfaction is substituted by that statute for the direct remedy given by the former one; but if that should prove abortive, this Court will, in the exercise of its discretion, give leave to the creditor to proceed directly against the persons liable to contribute towards the debts of the Company; but, according to the true construction of the 7 & 8 Vict. c. 110, and the 11 & 12 Vict. c. 45, so long as there is a reasonable prospect of obtaining payment by means of the last-mentioned statute, it is our duty to prevent individual creditors being called on to make good the debts of the Company. We ought, therefore, to stay proceedings where any execution has actually issued; and consequently, we should now prevent this execution from issuing."

Willes shewed cause in the first instance.—*First*, the debt sued for is not a debt of the Company, as the result of the action has shewn. The Company never obtained an Act, and therefore this case must be governed by *Walstab* v. *Spottiswoode* (*a*). *Secondly*, the 73rd section of the 11 & 12 Vict. c. 45, does not apply to a case where judgment has been recovered as in this case, for that judgment cannot be proved against the Company; and supposing that it could, the costs, for which the defendant has been arrested, could not. He cited *Marson* v. *Lund* (*b*).

Corrie, in reply.

POLLOCK, C. B.—This rule must be made absolute. The affidavits disclose sufficient to satisfy us that this is a debt of the Company, and that fact is not denied by the plaintiff. The proceedings must therefore be stayed, until the plaintiff has gone before the Master.

PARKE, B.—I am of the same opinion. I think that this case is within the Winding-up Act, provided the

(*a*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.
(*b*) In the Queen' Bench, post.

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debt is one for which the Company is liable, and not the defendant individually. The debt is sworn to be one of the Company, and that fact is not denied; and, indeed, there is abundant evidence of that fact on the affidavits. Then the 73rd section applies to this case; and on the authority of the case of *Thompson* v. *The Universal Salvage Company*, which I think was properly decided, this rule must be made absolute.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute (*a*).

(*a*) See *Prescott* v. *Hadow*, post.

COURT OF EXCHEQUER.

Easter Term, 1850.

THE BIRKENHEAD, LANCASHIRE AND CHESHIRE JUNCTION RAILWAY COMPANY *v.* COTESWORTH and Others. *April 19th.*

DEBT for calls in the statutory form (8 & 9 Vict. c. 16, s. 26).

The executors of a shareholder are not liable in an action for calls in the statutory form under the Companies Clauses Consolidation Act, when the call is made in the lifetime of the testator.

Pleas, *first*, never indebted; *secondly*, that the defendants were not nor are the holders of the shares.

The cause was tried at the Chester Spring Assizes, 1850, before *Cresswell*, J., when it appeared that the defendants were the executors of J. Gilfillan, who appeared on the register as the owner of the shares. The calls were made in February and August, 1849, after the death of Gilfillan. The will was proved by Cotesworth, power being reserved to the other defendants to come in afterwards.

It was contended at the trial, on behalf of the defendants, that, if the defendants were liable at all, they were

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not as executors liable in this form of action. The learned Judge was of that opinion, and nonsuited the plaintiffs, giving them leave to move to set aside the nonsuit and to enter the verdict for them.

Welsby now moved (*a*).—The form of declaration given by the 26th section (*b*) of 8 & 9 Vict. c. 16, is applicable to a case where the calls become due in the testator's lifetime.

(*a*) Before *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

(*b*) Which enacts, that, "in any action or suit to be brought by the Company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the Company to declare that the defendant is the holder of one share or more in the Company (stating the number of shares), and is indebted to the Company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the Company by virtue of this and the special Act."

The following sections were also referred to and relied upon:—

Sect. 21. "The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company; and with respect to the provisions herein or in the special Act contained for enforcing the payment of calls, the word "shareholder" shall extend to and include the legal personal representatives of such shareholder."

Sect. 27. "On the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special Act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the Company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

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That section must be read with the 21st; then it will appear that the term "shareholder" is applicable to the legal personal representative of a shareholder. [*Parke*, B.—You must also look at the 27th section. The defendants are liable only as executors, and there is no statement on these pleadings that they are sued as such.] If that be necessary, the 21st section becomes of no practical effect. [*Parke*, B.—The meaning of that section is, that the executors shall be liable on the shares of their testator; but it has no application to a case like this. Perhaps the legislature intended by that clause, that, as long as the executor holds shares, he shall be liable for calls whether he has funds or not. According to the argument contended for, there would be two sets of shareholders of the same shares at the same time,—the testator and the executors,—which cannot be.]

POLLOCK, C. B.—I think that the nonsuit was right. There will therefore be no rule.

PARKE, B.—I am of the same opinion. It cannot be contended that the defendants were shareholders at the time when the calls were made. Therefore, the 26th section, under which this declaration is framed, is altogether inapplicable to the present case. As to the 21st section, I think that the words "legal representatives" in that section apply to executors who are in the possession of shares, and make them liable for calls upon those shares. But at all events, that section does not make the testator and his executors shareholders of the same share at the same time. I therefore think that the form of the declaration is wrong, and that the action is not maintainable.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

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EXCHEQUER CHAMBER.

Michaelmas Term, 1849.

ASHPITEL *v.* SERCOMBE.

June 16*th*. 1850. *Feb.* 7*th*.

An allottee of shares who has paid his money for the shares in a concern which never comes into existence, or which is abandoned, may recover it back as money had and received to his use, unless he can be shown to have consented to or acquiesced in the application of the money (*a*).

The plaintiff applied for and had allotted to him shares in a projected Railway Company, and by his letter of application agreed to accept the same, subject to the provisions of the subscribers' agreement, and to execute the same and any other agreements or deeds. The letter of allotment stated, that scrip for the shares would be delivered to the plaintiff upon his "executing the parliamentary contract and subscribers' agreement." The subscribers' agreement gave the directors a much larger power than the 7 & 8 Vict. c. 110, s. 23, authorised them to assume, and also enabled them to expend the deposits in the exercise of such excessive power:—*Held*, that this was not such a deed as the plaintiff could be called upon to execute; that he was not bound by the application of the deposits according to that deed, and, the project having been abandoned, he was entitled to recover back his deposit. That, if the directors had prepared such a deed, as they might properly have called on the defendant to execute, and had given him an opportunity of executing it, he would have been bound by its terms, although he had not executed it.

On the winding up of the Company, a committee of inquiry was appointed, and the defendant had handed to him the minute-book, containing certain resolutions entered by the secretary:—*Held*, that the defendant was sufficiently a party to such resolutions as to make them evidence against him.

ASSUMPSIT for money had and received, and upon an account stated.—Plea, non assumpsit.

The action was tried before *Cresswell*, J., at the Spring Assizes, 1847, when it appeared, that, in August, 1845, the Metropolitan Railway Junction Company having been provisionally registered, registered and issued a prospectus, stating that the capital of the Company was to be 2,500,000*l*., in 100,000 shares of 25*l*. each—deposit, 2*l*. 12*s*. 6*d*. per share; and the defendant was, with his consent, registered as one of the provisional committee. He was also one of the managing committee, and acted as such.

On the 6th of October, 1845, the plaintiff sent to the committee of management the following letter of application for shares:—

"6th October, 1845.

"Gentlemen,—I request you to allot me 200 shares in this undertaking, and I agree to accept the same, or any portion thereof, subject to the provisions of the subscribers' agreement; and I further agree to execute the same and any other agreement or deeds, and to pay the deposit when

(*a*) See *Watts* v. *Salter*, Exch. Ch., 29th Nov. 1850, post.

required." The following letter of allotment was accordingly issued to him:—

"Metropolitan Railway Junction Company.
(Provisionally Registered pursuant to 7 & 8 Vict. c. 110.)

"Sir,—The committee of management having allotted to you 100 shares of 25*l.* each in this undertaking, I am instructed to request that you will pay the deposit thereon of 2*l.* 12*s.* 6*d.* per share, amounting to 262*l.* 10*s.*, to one of the under-mentioned bankers, who will sign the receipt at the foot thereof, on or before the 20th instant, or the directors will be empowered to cancel the allotment. I beg also to inform you that scrip for the shares will be delivered to you, in exchange for this letter and receipt, upon your executing the Parliamentary contract and subscribers' agreement, which lies here for signature until further notice, and afterwards at such other places as will be hereafter notified." (*Signed by the Secretary.*)

The plaintiff paid to one of the bankers the amount of his deposit, and received a receipt "on account of the committee of management."

It appeared that about 65,000 shares had been allotted, and the amount of the deposits paid up was near 17,000*l.* The committee of management had expended in advertisements and other preliminary expenses 6000*l.*, and had incurred a debt of 10,000*l.* for similar purposes. According to the Standing Orders, a sum of 150,000*l.* was required to enable the Company to go before Parliament, but the committee of management not having that amount, and the majority of the allottees having failed to pay up the deposits, the undertaking was abandoned.

On the winding up of the Company, a committee of inquiry was appointed, and the defendant had handed to him the minute book, containing a resolution dated September 22, 1845, as part of the proceedings of the directors.

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This was put in evidence by the plaintiff, after being objected to by the defendant's counsel. The subscribers' agreement was also put in; it was dated 15th October, 1845, and empowered the committee of management, or directors for the time being, to increase the capital of the Company of their own authority, if the engineer's estimate exceeded the then capital, the same to be raised by additional shares in such manner as they should think fit; and also, for any other reason, from time to time to increase and diminish the capital, with the assent of and in such manner as a majority of three to two at least of the subscribers, at a general meeting convened for that purpose, should require; to forfeit and re-allot the shares of any subscriber in default for one month for non-payment of any money required to be paid according to the stipulations of the deed; to take such measures as they might deem expedient to carry into effect the undertaking, and for that purpose, to cause such surveys and estimates to be made as they might think advisable, and for testing the correctness of the plans and estimates of the promoters of competing or other lines of railway, or of any party opposing; to make the deposit required by the Standing Orders out of the deposits, or payments on calls, or otherwise; and also to pay to each director or member of the managing committee such a reasonable sum as they should think fit for his trouble and loss of time, as well in that capacity as in that of sub-committee man, and to pay and allow to bankers, counsel, solicitors, secretaries, engineers, brokers, clerks, servants, and other persons who might be or might have been employed by them in relation to the undertaking all such fees, salaries, and recompense as they might think right; and generally, to apply such monies in and towards the fulfilment and enforcement of any bargains, contracts, arrangements, resolutions, or agreements into which they might have entered, or were thereby empowered to enter, and in satisfying all other costs, charges, expenses, and liabilities

which they or either of them might sustain, or incur, or had already sustained or incurred, in relation to the said undertaking, or otherwise thereunder, or in the execution or enforcement of the agreements and stipulations therein contained; the orders for such payments to be in writing, and signed by the chairman and two of the members of the said committee or directors, and countersigned by the secretary. It further appeared that this agreement, and also the Parliamentary contract, was on the 3rd of December sent to Exeter, where the plaintiff resided, for execution by the allottees, and that he had an opportunity of executing it, but did not.

The learned Judge directed the jury, that, if they thought that the project had been abandoned as abortive at the time of the commencement of the action, they should find a verdict for the plaintiff. The jury found a verdict for the plaintiff, damages 262*l.* 10*s.*, the defendant's counsel tendering a bill of exceptions.

The points of error of the plaintiff in error were—That the person who made the entry of the resolution of the 22nd of September, 1845, ought to have been called as a witness. That the learned Judge misdirected the jury; that the plaintiff, a subscriber to and adventurer in the undertaking, was not entitled to recover from the defendant, another subscriber and adventurer, the money he had paid to him and the other directors upon his shares in such undertaking, merely because of an abandonment a long time after the plaintiff had joined it, and after considerable expense had been incurred in furthering the objects of the Company.

Crowder, (with whom was *Montague Smith*,) for the plaintiff in error (*a*).—*First*, the resolution of September, 1845, was inadmissible, at any rate without calling the se-

(*a*) Before *Patteson*, J., *Coleridge*, J., *Coltman*, J., *Maule*, J., *Wightman*, J., *Cresswell*, J., *Erle*, J., and *Williams*, J.

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cretary who made it; there was also no evidence that the defendant was party to or knew anything of it. *Secondly*, the direction of the learned Judge was wrong. The payment of the deposit was made subject to the letter of allotment, which incorporates the subscribers' agreement, and, as the plaintiff had an opportunity of signing it, he was bound by its terms; and, the deposits having been expended conformably to it, there was not an entire failure of consideration so as to entitle the plaintiff to recover back his deposit: *Vane* v. *Cobbold* (*a*), *Atkinson* v. *Pocock* (*b*), *Walstab* v. *Spottiswoode* (*c*), *Garwood* v. *Ede* (*d*), *Clements* v. *Todd* (*e*), *Jones* v. *Harrison* (*f*). That the principle of *Walstab* v. *Spottiswoode* could not apply to this case, and that the liability to the whole of the preliminary expenses ought not to fall on the promoters; that the allottees were subscribers to one common concern, and could not sue each other, being a quasi partnership, at least for the purpose of obtaining the Act of Parliament: *Holmes* v. *Higgins* (*g*), *Lucas* v. *Beach* (*h*).

Butt, (with whom was *Greenwood*,) contrà.—*First*, the resolution was admissible in evidence; the defendant has recognised it as one of the books of the Company: 1 Ph. Ev. 357; *Alderson* v. *Clay* (*i*). *Secondly*, the ruling of the learned Judge was right, if *Nockells* v. *Crosby* (*k*), *Walstab* v. *Spottiswoode*, and *Willey* v. *Parratt* (*l*) be law, which it is submitted they are; but it is said, that the subscribers' agreement is to be taken as part of the contract under which the deposit was paid. It does not, however, ap-

(*a*) Ante, Vol. 5, p. 299; *S. C.*, 1 Exch. 798.
(*b*) 1 Exch. 796.
(*c*) Ante, Vol. 4, p. 321; *S. C.*, 15 M. & W. 501.
(*d*) Ante, Vol. 5, p. 134; *S. C.*, 1 Exch. 264.
(*e*) Ante, Vol. 5, p. 132; *S. C.*, 1 Exch. 268.
(*f*) Ante, Vol. 5, p. 138; *S. C.*, 2 Exch. 52.
(*g*) 1 B. & C. 74.
(*h*) 1 M. & G. 417.
(*i*) 1 Stark. 405.
(*k*) 3 B. & C. 814.
(*l*) Ante, p. 32; *S. C.*, 3 Exch. 211.

pear that that document was then in existence, or that the plaintiff was aware of its contents; moreover, that document is not warranted by the 7 & 8 Vict. c. 110, s. 23(*a*), nor is it such a one as the plaintiff was bound to

(*a*) Which enacts, "That, on the provisional registration of any Company being certified by the registrar of joint-stock Companies, it shall be lawful for the promoters of any Company so registered to act provisionally, but not for any longer period than twelve months from the date of the certificate, unless such certificate shall be renewed, which may be done on application for that purpose; and no such renewed certificate shall be in force for a longer period than twelve months from the date thereof; and it shall be lawful for the promoters of such Company to assume the name of the intended Company, but coupled with the words 'registered provisionally;' and also to open subscription lists; and also to allot shares and receive deposits by way of earnest thereon, at a rate not exceeding ten shillings for every one hundred pounds on the amount of every share in the capital of the intended Company; and also, in the case of Companies for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without the authority of Parliament, in addition to and exclusive of such sum of ten shillings per hundred pounds, such further sum per hundred pounds on the amount of every such share as may be required by the Standing Orders of either House of Parliament to be deposited before the obtaining of an Act of Parliament for enabling the Company to execute such work; and also, to perform such other acts only as are necessary for constituting the Company, or for obtaining letters patent, or a charter, or an Act of Parliament; but not to make calls, nor to purchase, contract for, or hold lands, nor to enter into contracts for any services, or for the execution of any works, or for the supply of any stores, except such services and stores or other things as are necessarily required for the establishing of the Company, and except any purchase or other contract to be made conditional on the completion of the Company, and to take effect after the certificate of complete registration, Act of Parliament, or charter, or letters patent, shall have been obtained, and, except in the case of Companies, for executing such works as aforesaid, contracts for services in making surveys, and performing all other acts necessary for obtaining an Act of Incorporation, or other Act for enabling the Company to execute such works."

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execute. [He referred to *Willey* v. *Parratt*(*a*), and *Wontner* v. *Shairp*(*b*).]

Crowder, in reply.

The judgment of the Court was now delivered by

PATTESON, J.—This is an action for money had and received, brought by the plaintiff, an allottee of shares in a proposed railway, which had been abandoned before the commencement of the action, without any fraud or misconduct, against the defendant, one of the managing committee, to recover back the plaintiff's deposit. The plaintiff applied for shares on the 6th of October, 1845, by letter, in which he says, "I agree to accept the same or any portion thereof, subject to the provisions of the subscribers' agreement; and I further agree to execute the same, and any other agreement or deed, and to pay the deposit when required."

On the 11th of October, a letter of allotment was sent to the plaintiff, containing notice to pay the deposit on or before the 20th of October, and adding, "I beg also to inform you, that scrip for the shares will be delivered to you, in exchange for this letter and receipt, upon your executing the Parliamentary contract and subscribers' agreement, which lies here, 11, Clement's Lane, London, for signature, until further notice, and afterwards, at such other places as will be hereafter notified."

The plaintiff resided at Exeter; he paid the deposit on the 20th of October, as required; on the 3rd of December, the subscribers' agreement was sent to Exeter, and the plaintiff had an opportunity of executing it, but did not. It was not, however, proved that he was called upon to exe-

(*a*) Ante, p. 32; *S. C.*, 3 Exch. 211.

(*b*) Ante, Vol. 4, p. 542; *S. C.*, 4 C. B. 404.

cute, nor that any notice was given to him, that the deed was at Exeter. The subscribers' agreement authorises the directors to take such measures and incur such preliminary expenses as they may think advisable, and also to extend the railway, or, if they should think fit, to abandon the undertaking; and it also especially authorises them to apply the deposits in payment of the expenses; and the deposits have been so applied, but the undertaking was abandoned, in consequence of the allottees not having furnished sufficient money to carry it on.

On the trial of the cause, a bill of exceptions was tendered to the learned Judge, by the learned counsel for the defendant, on two grounds. The first ground was, that he had received in evidence a certain resolution, to which it was argued, that the defendant was not sufficiently shewn to be a party. It appeared, that, on the winding up of the concern, a committee of inquiry, had been appointed, and the defendant had handed to him the minute book containing the resolution in question, as part of the proceedings of the directors. We think this is an abundant recognition by the defendant, and that the learned Judge was quite right in admitting the evidence; and I believe we said so upon the argument.

The other ground of exception was, that the learned Judge told the jury, that, if they thought that the project had been abandoned as abortive, at the time the action was commenced, they should find a verdict for the plaintiff. There seems to be no doubt that the plaintiff, having paid his money for shares in a concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to his use, unless he can be shewn to have consented to or acquiesced in the application of the money which the directors have made.

On these two grounds,—the failure of the project, and the

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want of consent or acquiescence,—the plaintiff's claim was founded.

They are both of them questions of fact, and must both be determined for the plaintiff, to enable him to recover. We think it clear, that the onus probandi on the first question is with the plaintiff; that is, that the concern has been abandoned; and on the second, with the defendant. That it is so with respect to the first, cannot be a question; and as to the second, there seems no doubt, that, in the absence of all evidence, documentary or otherwise, the plaintiff cannot be presumed to have consented to the expenditure. Each of these questions, being one of fact, is for the jury, unless the evidence on either of them should consist of written documents only, in which case it must be determined by the Court.

In the present case the learned Judge left the first question to the jury, and they having decided it in the affirmative, the verdict was directed for the plaintiff; and the ground of the exception is, that the verdict was directed to depend on the first question only, to the exclusion of the second. This direction is wrong, if there was any evidence for the jury on the second question, or if it was a question for the Judge, and he ought to have determined it in favour of the defendant. The case was treated, in some part of the argument for the defendant, as if the learned Judge had affirmed, as a general proposition, that, in all cases where a project had been abandoned as abortive, the deposit may be recovered; but that is not the right view of his decision, which was not general, but only that in this particular case there was no other question for the jury, and no question for the Judge which he ought to have decided for the defendant, and which would entitle him to a verdict. It is necessary, therefore, to inquire, *first*, whether there was any evidence of consent or acquiescence in the application of the money, besides the written documents; namely, the letters of ap-

plication, the allotment, and the subscribers' agreement; and *secondly*, whether, if there was no such evidence upon the true construction of the documents, the directors were entitled to retain the whole or part of the plaintiff's deposit. As to the first question there does not appear to be any evidence of consent or acquiescence other than what will arise out of the letters and subscribers' agreement. The plaintiff is not shewn to have known of the expenditure in question or of the power to make it, which the subscribers' agreement purports to give to the directors. It was indeed given in evidence that the deed was sent to Exeter, where the plaintiff resided, and that he had an opportunity of executing it; but we do not think his knowledge of or acquiescence in its contents can be inferred from that circumstance, because, as I have already observed, there is no evidence given of any notice to him that the deed was there. The learned Judge therefore seems to us to have been right in not leaving this question to the jury.

The remaining question is, whether the learned Judge ought upon the true construction of the letters and subscribers' agreement to have directed a verdict for the defendant. By the plaintiff's letter of the 6th of October, he applies for shares to be taken subject to the provisions of the subscribers' agreement, and by the letter of the secretary, of the 11th of October, this proposal is accepted, and these two letters constitute the contract on which the plaintiff paid his money. If the application which has been made of that money is according to the terms of this contract, the plaintiff cannot recover it, and the direction was wrong.

Now the terms of the subscribers' agreement given in evidence do purport to authorise the expenditure in question; and if that agreement was such a subscribers' agreement as the plaintiff agreed by his letter of application to be bound by, he cannot recover. Did he, then, agree by

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his letter to be bound by this subscribers' agreement? The letter certainly does not refer to this agreement in particular, nor to any supposed agreement, nor indeed does the agreement given in evidence appear to have existed at the time of the application for shares on the 6th of October, still less is there any ground for saying that the plaintiff was aware of its contents. The secretary's letter, indeed, of the 11th of October, does speak of a subscribers' agreement as then lying for signature in London; but there is no evidence that in fact that instrument was in existence, and, when it is produced, it appears to have borne date the 15th of October.

The plaintiff, therefore, was not by his letter of the 6th of October subjected to the terms of this particular deed or of any specified deed, but by the terms of any such deed as the directors might properly call on him to execute. If the directors prepared such a deed and gave him the opportunity of executing it, he would be bound by its terms, although he did not execute it; but if no deed at all, or no deed which he could properly be called upon to subscribe, was prepared by the directors, the condition in the letter of application, that the shares should be subject to the provision of the subscribers' agreement, became inoperative; and, in that event, the plaintiff would not be bound by the application of his money, for he does not by his letter agree to the expenditure of the deposit in any other way than as is comprehended in an agreement, that is, such subscribers' agreement as he might properly be called upon to subscribe, if it should contain some authority to apply the money. The question, therefore, is reduced to this,—was the agreement dated the 15th of October, as given in evidence, such a subscribers' agreement as the directors could properly call on the subscribers to execute? And it seems clear that it was not, inasmuch as it purports to give the directors a much larger power than the Act, the 7 & 8 Vict. c. 110, s. 23, authorises them to

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assume, and also purports to enable them to expend the deposit in the exercise of such excessive power.

The learned Judge therefore rightly decided that the written document did not entitle the defendant to a verdict; and as there was no evidence for the jury of consent or acquiescence of the plaintiff in the expenditure of the deposit, the learned Judge was right in directing that in this case, if the project was abandoned as abortive, the plaintiff was entitled to the return of his deposit.

The judgment must therefore be affirmed.

COURT OF EXCHEQUER.

Michaelmas Term, 1849.

THE AMBERGATE, NOTTINGHAM AND BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY *v.* MITCHELL. *Nov. 6th.*

DEBT for calls.—Pleas, *first*, never indebted; *secondly*, that the defendant was not a shareholder, modo et formâ; *thirdly*, fraud and covin.—Replication. Joinder in issue to the first two pleas, and de injuriâ to the third.

The special Act of a Railway Company provided, that, for the purpose of voting, each sum of 25*l.* of the capital of the Company should be considered as representing one share, and that no one should be entitled to vote in respect of any less proportion of the capital; that three months should elapse between the making of successive calls.

The cause was tried before *Pollock*, C. B., at the London Sittings after Trinity Term, 1849, when it appeared that the Company was incorporated by 9 & 10 Vict. c. clv; by

The capital of the Company was in the first instance divided in shares of 25*l.* each, but these were afterwards reduced to 20*l.* each. On the 11th of January *the directors* resolved, that a call be made payable on the 15th of February; and on the 8th of May they resolved, that another call be made payable on the 19th of June:—*Held, first*, that the shares were valid, though less than 25*l.* each; *secondly*, that the directors were empowered to make the calls; *thirdly*, that a proper interval had elapsed between the making of the two calls.

Per *Parke*, B.—A call may mean either the resolution, or its notification, or the time when it is payable.

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sect. 5 of which Act it was provided, "that the said capital shall be divided into such number of shares, and of such amount respectively, as will admit of the same being distributed amongst the several subscribers to the said undertaking, and other persons who may become entitled to shares therein, consistently with the provisions hereinafter contained; provided always, that, for the purpose of voting at meetings of the Company, each sum of 25*l.* of the capital of the Company shall be considered as representing one share, and no person shall be entitled to vote in respect of any less proportion of the said capital than the sum of 25*l.*"

The capital of the Company was originally divided in shares of 25*l.* each, but these were afterwards reduced to 20*l.* each. The calls for which this action was brought were made by the resolutions of the directors. The first was made on the 11th of January, payable on the 15th of February, and the second on the 8th of May, payable on the 19th of June. The private Act (sect. 10) enacted that "3*l.* per share shall be the greatest amount of any one call which *the Company may make on the shareholders*, and *three months at the least* shall be the interval between successive *calls*."

It was objected at the trial, *first*, that the Company had no power to create shares of less than 25*l.* each, or to alter their value when made, as that tended to diminish the votes. *Secondly*, that the *directors* had no power to make the calls, but that they ought to have been made by *the Company* at a general meeting. *Thirdly*, that the second call was bad, the prescribed interval of three months not having elapsed between the first and the second calls.

The Lord Chief Baron directed a verdict for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit, or to reduce the verdict by the amount of the last call.

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Humfrey accordingly now moved (*a*).—*First*, the Company had no power to create shares of a less amount than 25*l.*, or to alter the amount when once fixed. The special Act expressly provides how the capital shall be divided, and that no one shall be entitled to vote in respect of any less proportion of the capital than 25*l.*; so that, under the circumstances of this case, all the capital may have been subscribed for and no one entitled to vote. *Secondly*, the calls ought to have been made by the Company at their general meetings; the 22nd and 90th sections of the 8 Vict. c. 16 (*b*) expressly require this. *Thirdly*, there is not the prescribed interval of three months between the first and second call; for the first is payable on the 15th of February and the second was made on the 8th of May.

(*a*) Before *Pollock*, C.B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

(*b*) Which enact (sect. 22), that "it shall be lawful for the *Company* from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit: provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any; and that successive calls be not made at less than the prescribed interval, if any; and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls *so made*, in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the Company."

Sect. 90. "The directors shall have the management and superintendence of the affairs of the Company, and they may lawfully exercise all the powers of the Company, except as to such matters as are directed by this or the special Act to be transacted by a general meeting of the Company; but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special Act; and the exercise of all such powers should be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting."

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POLLOCK, C. B.—There will be no rule in this case. *First*, there is nothing in the special Act which prevents the Company from making shares of less than 25*l.* each; and therefore it is no objection that those shares are but 20*l.* The *second* objection is, that the directors are not competent to make these calls. I think, however, that they may do all things except what the shareholders are to do at a general meeting; and there is nothing in the Act rendering it necessary for the Company to make calls at a general meeting. The *third* objection is, that the proper interval had not elapsed between the making of the calls; but this is not so. If the 11th of January is to be taken to be the time of making the first call, then the 8th of May is the time of the making the second, and that is within three months; but if, on the other hand, the 15th of February is to be considered the time of making the first call, then the 19th of June is the time of making the second call. Therefore, in either case, there is the proper interval. We cannot construe the time of making the call to be the time when the call is payable in the one case, and the time of the resolution in the other.

PARKE, B.—I am of the same opinion. *First*, I think that it is competent for the directors to make shares of 20*l.* each, although a shareholder would have no vote except he possessed an interest in respect of the capital of the Company, to the amount of 25*l.* The directors are not bound to make an election as to the amount of the shares once for all. *Secondly*, the directors may exercise all the powers of the Company, except those which are to be exercised by the Company at their general meeting, and the power of making calls is not one of those which the Company are bound to exercise at such meetings. *Thirdly*, the term "call" is susceptible of three meanings. It may mean either the resolution itself, or the time of its

notification, or the time when the money is made payable. It must mean one of these three. Now if the notice and resolution in the present case are taken to constitute the call, then the call is regular; on the other hand, if the days of payment constitute the call, then the preceding is regular, because the days of payment of the two calls were on the 15th of February, and the 19th of June. It is probable the legislature intended that the days of payment should not be nearer to each other than three months, as it might be deemed inconvenient for the shareholders to find capital at shorter intervals. It is unnecessary, however, for us to give any opinion on that point.

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ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

COURT OF EXCHEQUER.

Michaelmas Vacation, 1849.

SHARROD *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Dec. 10*th.*

TRESPASS for driving a locomotive engine over the plaintiff's sheep, whereby they were killed.—Plea, not guilty.

In trespass against a Railway Company for running over the plaintiff's sheep and killing them, it appeared that the sheep got on the line by reason of the defect in the Company's fences, and were run over by an engine of the Company, driven by their servant. The engine was going at the rate directed by the Company, and could not be stopped so as to avoid the accident:—*Held*, that the Company were not liable in trespass; that, if the sheep were wrong-doers, there was no misconduct for which the defendants were responsible; that, if the sheep had escaped through defect of the defendants' fences, the sheep were not wrong-doers, and the damage would be consequent on the defendants' wrong, and the Company would be liable in an action on the case.

In all cases where a master gives the direction and control over a carriage or animal to a rational agent, the master is only responsible in an action on the case for want of skill or care of the agent.

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The cause was tried before *Rolfe*, B., at the Summer Assizes, 1848, for Stafford, when it appeared that, in consequence of the defect of the defendants' fences, the plaintiff's sheep escaped from his grounds to the line of the Company, where they were run over in the dusk of the evening by an express train propelled by an engine driven by an engineer in the service of the Company. The engine, it appeared, was going at the ordinary speed regulated by the orders of the Company; and it was assumed that the Company had given orders to drive at such a rate that the engine could not be stopped, so as to avoid running over the sheep. Under these circumstances, it was objected, on behalf of the defendants, that they were not liable in an action of trespass; and if liable at all, it could only be in an action on the case. A verdict, however, was by consent entered for the plaintiff, leave being reserved to the defendants to move to enter a nonsuit.

A rule nisi having been accordingly obtained by *Godson*,

Talfourd, Serjt., and *Whitmore* now showed cause (*a*).—The injury in this case was immediate, and therefore, as regards its nature, trespass is the proper form of action; and it makes no difference that the defendants were not present, for the act was that of the defendants, who required the engine to be driven at a given speed. [*Alderson*, B.—Formerly mail-coaches were driven at a given speed, but nobody ever thought that the authorities at the Post-office were liable for injuries caused by that speed. *Parke*, B.—This is not a case of inevitable necessity: it seems like the case where one trained soldier was casually injured by another whilst they were skirmishing (*b*). The sending the engine along the line was the act of the Company, and they no doubt are responsible for the con-

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(*b*) See *Weaver* v. *Ward*, Hob. 134.

sequences; but the question is, whether they are liable in this form of action, not having given orders for the injurious act.] At any rate, the Company have set the train in motion: the case is as if an arrow were shot from a bow. This case is different from that of a coachman, for there he has volition, and may avoid running over any one, but not so with an engine-driver. [*Alderson*, B.—Then the difference is only one of degree: the one vehicle is more dangerous than the other.] A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care: *Gregory* v. *Piper* (*a*). There *Bayley*, J., says, "The only question is, whether the trespass was the act of the master. The master desired the servant to lay down the rubbish, so as not to let it touch or lean against the wall of the plaintiff; but if, in the execution of the orders, it was the necessary or natural consequence of the act ordered to be done, that the rubbish should go against the wall, the master is answerable in trespass." [They further cited *M'Manus* v. *Crickett* (*b*), and *M'Laughlin* v. *Pryor* (*c*).]

Godson and *Huddleston*, in support of the rule.—The case of the coachman and that of the engine-driver stand on the same principle: both have the control of the power that they are directing The case of the bow and arrow is different, because the impetus of the arrow is given by the discharge. [*Alderson*, B.—There appears to be no doubt, that, if a master directs his servant to do a particular act, which by the mere force of nature cannot be done without producing injury, and the servant does the act, the master is liable in trespass for that injury, because he has directed his servant to do that which must necessarily have that result. The case of *Gregory* v. *Piper* proceeds on that principle. But if the act could have been

(*a*) 9 B. & C. 591. (*b*) 1 East, 106. (*c*) 4 M. & G. 48.

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done without causing any injury, and damage results, then the master is only liable in case. The difficulty, therefore, arises from the fact, that the directions were such that the engine must necessarily have gone over the sheep. In the case of *Scott* v. *Shepherd* (*a*), every person who threw the squib after the first, was an involuntary agent.] It is laid down in Bac. Abr. tit. "Trespass," (A), that, "if the carriage or the vessel is to be considered as a mere passive instrument, not less subservient to the person directing it, than a gun or a stick held in his hand, it would follow that all immediate injuries received from its contact while under an individual's direction, whether arising from accident, negligence, or wilfulness, are as much injuries committed by him, as a wound from his gun, or a blow from his stick; and it is in this light that such injuries appear to have been regarded by Lord Ellenborough, and the Court of King's Bench, in several cases. On the other hand, some other decisions seem to ascribe something of independent agency to a vessel under sail, and a carriage drawn by horses; and it has been held, that an injury received by their contact, if accidental, and not wilful, does not amount to an immediate trespass, but only to a case of consequential damage." [They also cited *Mount* v. *The Monmouthshire Canal Company* (*b*).]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—We are of opinion in this case, that an action of trespass will not lie against the Company, the defendants.

The immediate act which caused the damage to the plaintiff's cattle was the impact of a machine, which was under the control of a rational agent, the servant of the

(*a*) 2 W. Bl. 892; *S. C.*, 3 Wils. 403. (*b*) 4 M. & G. 452.

defendants; not so much so indeed as a horse, or a carriage drawn by horses or propelled by mechanical power along an ordinary highway would be, in which cases both the direction and the speed of the machine are under government, but still in such a degree as to make the cases similar for the purpose of deciding the present question. We may treat the case, then, as if the damage had been done by an ordinary carriage drawn by horses; and, it being now settled that an action of trespass will lie against a corporation, we may consider, for the present purpose, the defendants as one natural person, and the carriage under the care of his servant. Now, the law is well established, on the one hand, that, whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; and on the other, that if the act be that of the servant, and be negligent, not wilful, case is the only remedy against the master. The maxim "Qui facit per alium facit per se" renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the *direct* act of the servant the *direct* act of the master. Case will lie against a master for, in effect, employing a careless servant, but not trespass, unless, as was said by the Court, in *Morley* v. *Gaisford* (*a*), the act was done "*by his command;*" that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of. The former is the case, when one, as servant, is ordered to enter a close to try a right or otherwise; the latter, when such a case occurs as *Gregory* v. *Piper* (*b*), where the rubbish ordered to be removed, from a natural necessity fell

(*a*) 2 H. Bl. 442. (*b*) 9 B. & C. 591.

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on the plaintiff's soil; but, when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master: it is the voluntary act of the servant; nor can it, we think, be reasonably said that all the acts done in the skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass, to the same extent as if he had given them himself, because he has impliedly ordered them; but those that were careless and unskilful were not, for he has given no order, except to use skill and care.

Our opinion is, that, in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case, for want of skill or care of the agent—no more; consequently, this action cannot be supported.

We should observe, that, though the master in this case is taken to have ordered the driver of the engine to proceed at a great speed, it did not follow as a *necessary* consequence that it would impinge on the plaintiff's cattle. It might not have happened, if the driver had seen the cattle sooner, or the cattle had heard the engine, and got out of the way. The act, therefore, cannot be treated as a trespass, on the ground that it was, by necessary implication, ordered to be done by the defendants—the principle on which the case of *Gregory* v. *Piper* was decided. This is the simple case of an act done by the servant in the course

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of his employment, not specifically ordered by the master; and though the injury by such an act be *direct*, so far as relates to the servant, we have recently held that a master would not be responsible in trespass: *Gordon* v. *Rolt* (*a*).

If in the present case the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy, by an action on the case against the Company, for causing the engine to be driven in such a way as to injure that right; for the defendants were bound to see that their carriages did not travel at such a speed as to make it impossible to avoid other persons, who had a lawful right to be there.

If the cattle were altogether wrong-doers, there has been no neglect or misconduct for which the defendants are responsible.

If the cattle had an excuse for being there, as, if they had escaped through defect of fences which the Company should have kept up, the cattle were not wrong-doers, though they had no right to be there; and their damage is consequent on the wrong of the defendants in letting their fences be incomplete or out of repair, and in that case compensation may be recovered against the defendants in an action on the case.

Rule absolute.

(*a*) 4 Exch. 365.

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COURT OF QUEEN'S BENCH.

Trinity Vacation, 1849.

July 5th.

In re COOLING AND THE GREAT NORTHERN RAILWAY COMPANY.

The owner of land in the city of L. claimed compensation, under the Lands Clauses Consolidation Act, for an injury done by a Railway Company to such lands in the construction of their works. The injury was occasioned by the works of the Company in the county of L., by cutting off the communication on the county side with a ferry appurtenant to the claimant's land:—*Held, first*, that the jury of the city were competent to try the question of compensation; *secondly*, that the ferry, if attached to the claimant's land, was a private right in respect of which compensation might be assessed; *thirdly*, that the jury were warranted in finding, under the circumstances, that the ferry was vested in the claimant.

THIS was a rule calling upon Edward Cooling to shew cause why a writ of certiorari should not issue to bring up an inquisition taken before the Sheriff of the City of Lincoln, and the judgment thereon, for the purpose of having them quashed, and why a prohibition should not issue to prevent the said Edward Cooling taking any further proceedings under the inquisition and judgment.

From the affidavits that were filed, it appeared, that, in the year 1848, the Great Northern Railway Company constructed a portion of their line along the west bank of a certain cut or river, called Fossdyke, such west bank being in the parish of Skellingthorpe, in the county of Lincoln, and the centre of the bed of the said cut or river being the boundary between the said parish of Skellingthorpe and the parish of St. Mary-le-Wigford, in the city of Lincoln. On the 23rd of September, 1848, the Company received from the said Edward Cooling a notice, claiming compensation in respect of his interest in certain lands situate in the parish of St. Mary-le-Wigford, in the city of Lincoln, which lands had been injuriously affected by the execution of the works of the said Company, and desiring to have the amount of compensation due to him in respect of the said lands assessed by a jury of the city of Lincoln. He also thereby gave notice to the Company, that his interest

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in such lands was as owner in fee simple; and that the manner in which such lands had been injuriously affected was, by the disturbance of and cutting off the communication with an ancient ferry attached, and belonging to, and held with, the lands in question, and by erecting another ferry near to such ancient ferry belonging to him, by all which said acts they had considerably reduced the profits of his said ancient ferry; and he claimed as compensation 700*l.* On the 2nd of October, the Company sent to Cooling a notice, stating that they should, after the expiration of ten days, issue their warrant to the Sheriff of the city of Lincoln, requiring him to summon a special jury, for the purpose of inquiring, assessing, and delivering a verdict for the sum of money to be paid to Cooling in respect of certain portions of land situate in the parish of St. Mary-le-Wigford, which were alleged by him to be injuriously affected by their works. No reply having been sent to this notice, the Company, on the 14th of October, issued their warrant to the Sheriff of the city of Lincoln, requiring him to summon and empannel a special jury of the said city, to inquire of, assess, and give a verdict for the sum of money to be paid by the said Company by way of satisfaction to Cooling, for all damage, if any such there be, sustained, or to be sustained by him by reason of the exercise by the said Company of the powers of their Act, as regards certain lands, &c., situate in the parish of St. Mary-le-Wigford, in the city of Lincoln, of which he claimed to be owner in fee simple, and which he alleged had been injuriously affected by the execution of the works of the said Company; and further, to inquire, and, by their verdict, to ascertain and settle all such other matters and things as they might, by virtue of the provisions of the said Act, be lawfully required to do. The jury were duly returned and empannelled, and the inquiry took place in the city of Lincoln on the 3rd of November, when Cooling appeared by counsel, and claimed compensation for the

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disturbance of and cutting off the communication with a ferry, to which he alleged that he was entitled, across the Fossdyke. The only evidence given by him of his title to the ferry was a demise by an indenture of the 5th day of April, 1827, from the Corporation of Lincoln to him, of three closes of land situate in the parish of St. Mary-le-Wigford, in the city of Lincoln, and lying near the said ferry, with *the profits and commodities to the said closes belonging*, for the term of thirty-one years, and a subsequent conveyance, by indenture of the 10th of November, 1844, of the reversion or remainder in fee of and in the said premises mentioned in the said demise. The alleged ferry was not mentioned in either of these deeds; but it was claimed by Cooling as having passed to him under the words "*profits and commodities* to the said closes belonging," contained in the said indenture of demise. It further appeared, that the lessees of the land demised had, as far as living memory went, used the ferry, and had taken toll at it. The centre of the Fossdyke was the boundary between the city and county of Lincoln; and the railway and the works connected therewith were constructed wholly on the west side of the said cut or river, and wholly within the county of Lincoln; and the cutting off the communication with the alleged ferry was caused by the Railway Company having, in the construction of their line and works on the west side of the Fossdyke, obstructed the access to a communication with the landing-place of the said ferry on the west side of the said cut or river, which said access, communication, and landing-place were within the county of Lincoln, and not in the city and county of the city of Lincoln.

It was contended, on behalf of the Company, that there was no case to go to the jury; and that the jury had no jurisdiction or power to assess compensation in favour of Cooling, inasmuch as he had not shewn any title to the ferry; and that the same never passed to him by the deeds

upon which he relied in support of his title; and that Cooling was not a party entitled to compensation within the special Act of the said Company, or the Acts incorporated therewith. Also, that the access to, and communication with, the said ferry having been proved, by the evidence on behalf of Cooling, to have been the access thereto, and communication therewith, in the county of Lincoln, and not in the city of Lincoln, the case, so far as regarded the cutting off such access and communication, was not within the jurisdiction or cognisance of the said sheriff, or a jury of the said city and county of the said city of Lincoln. The sheriff held, that Cooling was a party entitled to compensation; and that the jury had jurisdiction to decide what compensation should be paid to him; and they found a general verdict for Cooling, and assessed the compensation to be paid to him by the said Company at the sum of 380*l.*

This rule having been obtained,

Crowder and *Tomlinson* now shewed cause (*a*).—It is true that no land of the claimant is touched by the Company's works, but the ferry which is attached to his property is injuriously affected by the works; for that he is entitled to compensation: *Trotter* v. *Harris* (*b*), *Huzey* v. *Field* (*c*), *Peter* v. *Kendal* (*d*). The principle of the case of *Reg.* v. *The Eastern Counties Railway Company* (*e*) does not apply to this. As to the venue of the inquiry, that was right: it might have been either in the county or the city. *Sutton* v. *Clarke* (*f*). But, the Company having issued their warrant to the Sheriff of the city, are estopped from questioning his jurisdiction: *Reg.* v. *The Trustees of Swansea Harbour* (*g*).

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., and *Erle*, J.
(*b*) 2 Y. & J. 285.
(*c*) 2 Cr. M. & R. 432.
(*d*) 6 B. & C. 703.
(*e*) Ante, Vol. 2, p. 736; *S.C.*, 2 Q. B. 347.
(*f*) 6 Taunt. 29; *S.C.*, 1 Marsh. 429.
(*g*) 8 A. & E. 439.

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The *Attorney-General*, (Sir *J. Jervis*), *Wortley*, and *Karslake*, contrà.—The Company are not estopped from objecting to the want of jurisdiction, as no assent can give jurisdiction; but, independently of that objection, Mr. Cooling's claim is not a subject of compensation: *Rex* v. *The London Dock Company* (*a*). The Lands Clauses Consolidation Act, as to lands injuriously affected, apply only where there is a direct injury to land.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.—In this case Cooling claims compensation from the Great Northern Railway Company in respect of an injury to land held by him in fee in the city of Lincoln. The injury, if any, is occasioned by the works of the Company in the city of Lincoln, on the other side of the Fossdyke, by cutting off communication on the Lincolnshire side with a ferry said to belong, or to be appurtenant to, the land of Cooling. Objection is made to the jurisdiction of a city jury; but it appears that the boundary of the county and city is in the midst of the Fossdyke, and the land injured lies wholly in the city. The jury of the city were, therefore, competent to try the question: *Sutton* v. *Clarke* (*b*). Objection is also made, that this case is within the principle of *Rex* v. *The London Dock Company* (*c*), where it was held, that the destruction of houses and public roads in the neighbourhood of a public-house, by which the custom of the house was diminished, was not the subject of compensation; but the present case is quite distinguishable. Here the ferry is a private right; and if it be attached to the land of Cooling, the value of that is seriously affected. The question is, whether it be so attached. Cooling is not the owner of the water, nor of the landing-place, as it would seem, on either side, certainly not on the Lincolnshire side;

(*a*) 5 A. & E. 163.

(*b*) 6 Taunt. 29; *S. C.*, 1 Marsh. 429.

(*c*) 5 A. & E. 163.

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but it is not essential to a ferry, that the owner of it should have the land on either side, if he has the right of using that land for the purpose of the ferry: *Peter* v. *Kendal* (*a*); and the evidence of user here for many years is abundant to shew such right. The only difficulty is the title to the ferry. The land, it appears, belonged to the Corporation of Lincoln till the year 1844, when it was sold to a Mr. Hill, a trustee of the Cooling family, who had a lease of it from the Corporation; and by Mr. Hill it was sold to Cooling. Neither the lease nor the conveyance expressly mention the ferry, but they lease and convey the land with its profits and commodities. There is no evidence as to the original grant of the ferry by the Crown, nor as to any conveyance of it by name. The lessees of the land have always, as far as living memory goes, kept a boat and taken toll at the ferry; and it is plain that they must have done so by the permission of the Corporation, though no express lease of the ferry appears ever to have been made. It is left quite uncertain whether the grant was originally to the owner of the land, and the Corporation had the ferry as such owners, or whether it was to the Corporation as such, independent of their ownership. Probably the latter, because the landing-place is not shewn to belong to the Corporation or Cooling; and if the grant had been to the owner of the land, it would probably have been to him who owned the landing-places. On the other hand, as the Corporation have never separated the land and the ferry, it may fairly be inferred that they were connected by the original grant. If they had at any time been separated, and if the ferry had been conveyed to Cooling by the Corporation, separately from the land, he clearly would not have been entitled to compensation in respect of any injury to his land, for which only he claimed it, and for which a jury was summoned, and gave their verdict in his

(*a*) 6 B. & C. 703.

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favour. But there has been no separate conveyance; and the only question, therefore, is, whether the ferry has passed to Cooling by the conveyance of the land with its profits and commodities. Under all the circumstances, we think that the jury were warranted in coming to the conclusion that it did so pass; and at all events that there is no such want of jurisdiction as to call upon us to grant a writ of certiorari or of prohibition in this case.

Rule discharged, with costs.

COURT OF EXCHEQUER.

Easter Term, 1849.

May 1st.

On an assignment of a railway bond, under the 46th section of the Companies Clauses Consolidation Act, the proper party to sue is the assignee.

VERTUE *v.* THE EAST ANGLIAN RAILWAY COMPANY.

DEBT on bond, dated 31st December, 1847.—Plea, that the defendants, in pursuance and exercise of the powers vested in them under and by virtue of the East Anglian Railways Act, 1847, borrowed of the plaintiff 1000*l.*, upon the security of the said bond, and that an entry and memorial of the bond was duly entered on the register of mortgages and bonds; that the plaintiff, being the party entitled to the bond, by deed sealed and delivered, by virtue and in pursuance of the provisions of the said Act, transferred the said bond, and all the plaintiff's right and interest in and to the said money thereby secured, to Sir C. W. Taylor, Bart.; that, after the making of the said deed, the said transfer thereby made was within thirty days after the date of the said last-mentioned deed and transfer, and before the commencement of this suit, duly produced to W. Williams, as the secretary of the defendants, and who, as such secretary, then kept

the said register of mortgages and bonds; and that the said W. Williams, so being such secretary as aforesaid, thereupon forthwith made an entry or memorial of the bond in the register, and thereupon and from and immediately after the making of the said last-mentioned entry or memorial, and before the commencement of this suit, the plaintiff ceased to be entitled to, or to have any right or interest in any respect, to or in the said supposed writing obligatory in the declaration mentioned, or any or either of them. That the said transfer, and the said entry or memorial of the said transfer, having been so made as aforesaid, thereupon and from and immediately after the making of the said last-mentioned entry or memorial, and before the commencement of this suit, the said transfer, by virtue of the said Act, entitled the said Sir C. W. Taylor, Bart., to the full benefit of the said bond and writing obligatory in all respects; and the said Sir C. W. Taylor, Bart., then and by virtue of the said Act became and was, and from thence hitherto hath been and still is entitled to the said bond and writing obligatory, and to the said sum of money thereby secured, and to the benefit of the supposed causes of action in the said first count mentioned, &c.

Special demurrer, assigning for cause that it did not appear that the bond was one which could be assigned under the East Anglian Railway Act, 1847, and the 8 & 9 Vict. c. 16.

Prentice (with whom was *Peacock*), in support of the demurrer.—The special Act, 10 & 11 Vict. c. cclxxv, s. 5, incorporates the Companies Clauses Consolidation Act with it, and the power of assigning bonds is provided for by sects. 46 & 47 of that Act (*a*); but it is the right of pro-

(*a*) Which enact: Sect. 46, that "any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly

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perty alone that is assignable, and not the cause of action; the action must still be brought in the name of the assignor. In *Jeffery* v. *M'Taggart*(*a*), which was an action by a trustee of the sequestered estate of a bankrupt in Scotland, it was held that he could not sue in his own name for a debt due to the bankrupt. The words of the section there relied upon (sect. 29 of 54 Geo. 3, c 137) are stronger than those of the 47th section: that "the Court shall declare *every right, title, and interest*, which was formerly in the bankrupt, to be now in the trustee, for the purposes aforesaid." Yet it was held, that the utmost extent to which the language of the section could be carried, was to convey a right of property. [*Pollock*, C. B.—I could never understand that case. It is, however, remarkable, that there there is to be but one assignment, but here there may be several. The 47th section of the Companies Clauses Consolidation Act is certainly very strong.] The case of *Jeffery* v. *M'Taggart* has since been recognised in *Sidaway* v. *Hay*(*b*).

Bramwell, contrà, was not called upon.

stated; and every such transfer may be according to the form in the schedule (E) to this Act annexed, or to the like effect."

Sect. 47. "Within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the secretary, and thereupon the secretary shall cause an entry or memorial thereof to be made in the same manner as in the case of the original mortgage; and, after such entry, every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects; and no party, having made such transfer, shall have power to make void, release, or discharge the mortgage or bond so transferred, or any money thereby secured; and for such entry the Company may demand a sum not exceeding the prescribed sum, or, where no sum shall be prescribed, the sum of two shillings and sixpence; and until such entry the Company shall not be in any manner responsible to the transferee in respect of such mortgage."

(*a*) 6 M. & S. 126.

(*b*) 3 B. & C. 12; *S. C.*, 4 D. & R. 658.

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POLLOCK, C. B.—The defendants are entitled to our judgment. The words of the 46th section of the Companies Clauses Consolidation Act are, "may from time to time transfer his right and interest therein," and the words in the form of transfer of the bond given in Schedule (E) are, "I do hereby transfer all my right, estate, and interest." There being a particular power to transfer what could not be transferred before, it must mean to all intents and purposes. How can the assignee have the entire right, estate, and interest of the assignor if he has not the right to sue?

It is not necessary to distinguish this case from *Jeffery* v. *M'Taggart*, for neither the words of the Scotch Act nor the objects are the same. Here the object of the statute was to make the bond negotiable, so that all the rights of the assignor should be transferred to his assignee.

ROLFE, B.—I am of the same opinion. If the meaning of the Act is not that the assignee may sue, the power would be nugatory. The machinery relating to the transfers would be utterly useless unless the transferees take for all purposes. In sect. 45 it is enacted, that the register of mortgages of the Company shall be open to the inspection of the respective mortgagees or bond creditors. Who are the bond creditors? Not the parties to whom the bonds were originally given, but those to whom the bonds have been assigned, and who appear on the Company's books as bond holders: those are the parties who are entitled to sue.

PLATT, B.—I am of the same opinion. The 46th section intended to give the parties the power to convey the legal interest in the bond to the trustee.

Judgment for the defendants.

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COURT OF CHANCERY.

BEFORE THE MASTER OF THE ROLLS.

Nov. 12*th*, 13*th*, & 14*th*. 1850. *Jan.* 12*th*.

BAILEY *v.* THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.

The capital of a Company was divided into three classes of shares, viz. 31*l.*, 27*l.* 10*s.*, and 22*l.* each. A call of 10*s.* per share was made on the holders of the 31*l.* shares alone, whereupon the plaintiff filed his bill on behalf of himself and all other holders of 31*l.* shares, except such defendants as were holders of such shares against the Company and the directors, alleging undue partiality to the holders of other shares; that the call was not required for the purposes of the Act, and that the real motive of the call was to compel the 31*l.* shareholders to enter into an agreement injurious to their rights. The bill prayed an inquiry whether any and what part of the call was necessary, and an injunction. The defendants demurred for want of equity and parties.

Demurrer allowed, on the ground that the bill contemplated a continuance of the Company, and that the Court could not entertain jurisdiction without assuming authority to interfere with the internal management of continuing partnerships and companies:—*Held*, that plaintiff could not sue on behalf of the shareholders who had paid, and those who had not paid the calls, and that the bill was defective in not alleging that the holders of the other shares were duly and fully represented by the defendants.

Leave to amend bill refused.

In an argument on demurrer, sections of Railway Acts, though declared to be public Acts, cannot be referred to unless they are stated in the bill.

THE bill in this case was filed by Joseph Bailey, on behalf of himself and all other holders of 31*l.* shares in the Birkenhead, Lancashire, and Cheshire Junction Railway Company, except such of the defendants as were holders of such shares, against the said Company and against the directors.

The bill stated the several Acts authorising the construction of the railway, by the first of which (7 Will. 4 & 1 Vict. c. cvii,) the Company were authorised to raise 250,000*l.*, divided into shares of 50*l.* each; and by a subsequent Act (3 & 4 Vict. c. ii), a power was given to the Company to raise an additional capital of 125,000*l.*, in order to complete the works. By the first Act, the whole of the capital of 250,000*l.*, except about 4000*l.*, was raised by shares issued at par; and by the second Act, 5000 shares were created of the nominal value of 25*l.* each, 4959 of which were issued at a discount of 5*l.* per share. In 1842, the Company, under the same Act, created 7500 shares, of the nominal value of 50*l.* each, 7415 of which were issued at a discount of 33*l.* per share.

In 1845, another Act (8 & 9 Vict. c. xcix), was passed au-

thorising the Chester and Birkhenhead Railway Company to extend their railway, and to raise a capital of 300,000*l.* for that purpose. The Company, in pursuance of this Act, created 15,000 shares of 20*l.* each, 14,780 of which were issued at par.

In 1846, an Act was passed (9 & 10 Vict. c. xci), authorising the construction of the Birkenhead, Lancashire, and Cheshire Junction Railway, with a capital of 1,500,000*l.*, to be divided into 450,000 shares of 33*l.* 6*s.* 8*d.* each, all of which were issued at par. All the powers for raising monies under the first-mentioned Acts had then been exhausted.

In 1847, an Act (10 & 11 Vict. c. ccxxii) was passed for amalgamating the Chester and Birkenhead Railway with the Birkenhead, Lancashire, and Cheshire Junction Railway, under which Act the rights and powers of the former were vested in the latter Company.

By the 12th section of that Act, power was given to the Birkenhead, Lancashire, and Cheshire Junction Railway Company to create such a number of shares, or such an amount of stock, as would admit of shares or stock in the said Company being allotted to the holders of shares in the Chester and Birkenhead Railway Company in lieu of the capital held by them in the capital of the said Company, according to the scale and in the proportion following (sect. 13):—The proprietor of one share in the Chester and Birkenhead Railway Company, of the nominal value of 50*l.*, to be entitled to two shares in the Junction Company, of the nominal value of 27*l.* 10*s.*, without being required to pay any sum or sums in respect thereof. The proprietors of 25*l.* shares to be entitled to a like number of shares in the Junction Railway, of the nominal value of 27*l.* 10*s.*, without being required to pay any sum or sums of money in respect thereof; and the proprietor of 20*l.* shares to be entitled to a like number of shares in the Junction Railway Company, of the nominal value of 22*l.* each.

The 14th section enacted, that, as to the shares of 27*l.*

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10*s.* each, they were declared to be fully paid up, except in respect of so much money as may have been called for by the Chester and Birkenhead Company, and not paid up on the shares of 50*l.* each, or the shares of 25*l.* each, exchanged for the same; and as to any of the shares of 22*l.* each in the Junction Railway, given in lieu of shares in the Chester and Birkenhead Company, upon which, at the time of the passing of the Act, calls should have been made and not paid up, or upon which the full amount per share should not have been called up, it should be lawful for the Junction Railway Company to call for and enforce calls made, in the same manner as if the monies had been subscribed to the Junction Railway Company. By the 15th section, calls paid on the original shares were to be considered as paid upon the substituted shares; and by the 17th section, the proprietors of shares in the Junction Railway Company were entitled to interest on the nominal value of the shares vested in them respectively, at the rate therein named, subject to deduction in respect of any sums which the Junction Railway Company should be entitled to call for on the shares of 22*l.* each.

By the 18th section, such interest was payable in preference to any interest on any other part of the capital of the Junction Railway Company.

The 20th section was as follows:—"And whereas the capital authorised to be raised by the Birkenhead, Lancashire, and Cheshire Junction Railway Company, by the hereinbefore recited Act, is 1,500,000*l.*, which is to be raised in shares of the nominal value of 33*l.* 6*s.* 8*d.* And whereas the amount which will be paid to the Chester and Birkenhead Company, as premium on their several shares, is 105,000*l.*; Be it enacted, that it shall not be lawful for the said Birkenhead, Lancashire, and Cheshire Junction Railway Company to raise more capital under the powers of their said recited Act than 1,395,000*l.*, and the nominal value of each share in such capital shall be reduced from 33*l.* 6*s.* 8*d.* to 31*l.*"

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By the 21st section, the proprietors of 27*l.* 10*s.* and 22*l.* shares were, after the 1st of January, 1850, to be entitled to share the profits of the undertaking *pari passu* with the proprietors of 31*l.* shares, in proportion to the amount paid up.

A call of 1*l.* 5*s.* was made in respect of the 31*l.* shares, and a call of 3*l.* in respect of the 22*l.* shares, and such calls were made payable in 1847; and in 1848 another call of 2*l.* 5*s.* was made in respect of the 31*l.* shares.

The bill then alleged, that, subsequently to the calls, and before November, 1848, J. B., the chairman of the Birkenhead, Lancashire, and Cheshire Junction Railway Company, and such of the Company as were still directors, formed a scheme for conducting the affairs of the Company without regard to the general benefit of the shareholders, and in such manner as to promote their individual interests and to benefit the holders of the 27*l.* 10*s.* and 22*l.* shares, to the prejudice of the 31*l.* shareholders; and they determined, before they carried their scheme into execution, that such of them as were holders of 31*l.* shares should sell such shares and purchase 27*l.* 10*s.* and 22*l.* shares, so as to render it certain that the majority of the directors should be holders of the last-mentioned shares.

The bill then stated that the directors, intending to depreciate the 31*l.* shares, caused some intimation to be given to the dealers in shares at Manchester and Liverpool of an intention to abandon a considerable part of the railway authorised by the Act of 1846, although they intended to make full calls upon those shares; and that, at a meeting held on the 25th of November, 1848, they proposed terms for the relinquishment or modification of the interest of the 31*l.* shareholders, which were alleged to be injurious to them, and were dissented from by the plaintiff and divers other holders of such shares.

That, notwithstanding this dissent, the directors, in February, 1849, introduced a bill into the House of Commons

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to authorise the Company to abandon a part of the line, to form a new line to join the London and North Western, to alter the mode of constructing part of their works, and to alter their tolls, and for other purposes. It further proposed to enable the Company to abandon parts of the railway works which they had obtained power to make, and for a corresponding reduction in the amount of the capital of the Company, and also for a modification of the interests of the 31*l.* shareholders, proposing to cancel those shares, and, in lieu thereof, to create 106,000 new shares of the nominal value of 7*l.* each, upon which 1*l.* 5*s.* was to be considered as paid, and to give the proprietors of the 31*l.* shares an equal number of such new shares in lieu thereof.

That a petition had been presented against this bill by the holders of 31*l.* shares, and in consequence, an alteration had been made in the proposed enactments, and that it was finally withdrawn in consequence of the committee to whom the bill was referred proposing to introduce clauses respecting the tolls. The bill further stated, that the directors had, for the purpose of intimidating the holders of the 31*l.* shares, and to cause them to desist from opposing the bill in Parliament, made a call of 10*l.* per share on the 31*l.* shares, one-half to be paid in March, and the other in April, 1849.

The bill alleged, that this call was not required for the execution of any of the works which at the time thereof were being made, or intended to be executed; that a great part of the originally proposed line had been abandoned; and that such abandonment had rendered the raising the full amount payable in respect of the shares unnecessary; and that 13*l.* per share was all that ought to be raised; that, 10*l.* having been already paid, the present call ought not to exceed 3*l.*

The bill then charged the directors with fraud and oppression against the holders of the 31*l.* shares, and with undue favour to themselves and the rest of the holders of

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other shares; that, by reason of the arrears in respect of calls on the 31*l.* shares, the holders of the other shares in the Company were sure of a majority of votes at all meetings of the Company, and that the holders of 31*l.* shares had considered it useless to attend such meetings; that the monies authorised to be raised were limited to the purposes of the Acts 1846 and 1847, and were not authorised to be raised or applied for paying off any monies borrowed on mortgage by the Chester and Birkenhead Railway Company, but that the defendants intended nevertheless so to apply them; that the defendants alleged that they had not abandoned the making of any part of their proposed line; but the bill charged the contrary to be the truth, and that the Company had not purchased, or taken any steps to purchase, any of the lands required for the portions of the line alleged to have been abandoned, and that it was wholly impracticable for them to make the line without another Act.

The bill charged, that the number of holders of 31*l.* shares was so great, and their rights and liabilities so subject to change by death and otherwise, that it would not be possible, without the greatest inconvenience, to make them parties, but that the interests of all such shareholders, except such (if any) of the defendants as were holders of such shares, were identical with the interests of the plaintiff in respect of the matters in the bill mentioned, and that all such shareholders, except as last aforesaid, had a common interest in obtaining, and in fact consented and agreed to the relief thereby prayed.

The bill contained a similar charge as to the impossibility of making all the holders of 27*l.* 10*s.* and 22*l.* shares parties.

The bill then prayed, that it might be ascertained, under the direction of the Court, whether any and what part of the call of 10*l.* per share was required for any of the purposes to which the monies to be raised by means of the shares of 31*l.* each were lawfully applicable; and that the

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defendants, their solicitors, and agents might be perpetually restrained by injunction from commencing or prosecuting against the plaintiff, or any of the shareholders on whose behalf he sued, any action or other proceedings at law, for enforcing the payment of any part of such call, other than such part as might be so required; and from declaring, confirming, enforcing, or otherwise acting upon any forfeiture of any of the shares of 31*l.* each in respect of any part of such call, other than such part as might be so required; and that any part of such call which had been paid by any of the shareholders on whose behalf the plaintiff sued, other than such part as might be so required, might be repaid to such shareholders; and that, in the meantime, and until the part so required of such call should be ascertained by the direction of the Court, the defendants might be restrained by injunction from commencing or prosecuting any action or other proceedings at law against the plaintiff or the shareholders on whose behalf he sued, or any of them, in relation to the same call or any part thereof; and from declaring, confirming, enforcing, or otherwise acting on any forfeiture of any of the 31*l.* shares, in respect of the same call or any part thereof; and that the defendants might be restrained by injunction from making any further call on the holders of the 31*l.* shares, and from commencing or prosecuting any action or other proceeding at law against the plaintiff or the shareholders on whose behalf he sued, or any of them, in relation to any such further call, or any part thereof; and also from declaring, confirming, enforcing, or otherwise acting on any forfeiture of any of the 31*l.* shares, in respect of any such further call; and also from applying any of the monies received or to be received in respect of the 31*l.* shares, towards paying the monies borrowed by the Chester and Birkenhead Railway Company, or any part thereof, or for any other purpose to which the monies so received or to be received were not properly applicable.

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To this bill the Company put in a demurrer generally, for want of equity, and also a demurrer for want of parties, on the ground, that a sufficient number of holders of shares of 27*l.* 10*s.* and 22*l.*, other than the directors, had not been made parties, so as to represent the interest of such shareholders generally.

Mr. *Turner* and Mr. *Glasse*, in support of the demurrers, contended, that a Court of equity would not interfere in any single transaction of a Company, which must be considered in the light of a partnership. That ample power was vested in the body of shareholders, to do that which the plaintiff required of the Court; and that the power and jurisdiction being vested in the body of shareholders, this Court would not interfere, even if the shareholders were parties to the suit; but in this case they had not been made parties, which made the case stronger against the plaintiff: *Evans* v. *Stokes* (*a*). The Court could not judge of the money required for the purposes of the Company, whether for payment of debts or for other expenses, and it had not the means of knowing whether the calls made were or were not reasonable or necessary. That the plaintiff by his bill had admitted, that if he could have commanded a majority of votes, it would not have been necessary for him to apply to the Court; but there was nothing in the present case which shewed the Court that the majority of votes were doing anything beyond their powers, which could be the only ground for the resolutions of the majority not binding the minority. If the parties themselves refused or neglected to do all in their power to carry on the concerns of the partnership or Company, they could not call on the Court to assist them: *Waters* v. *Taylor* (*b*), *Const* v. *Harris* (*c*). It was also contended, that the plain-

(*a*) 1 Keen, 24. (*b*) 15 Ves. 10. (*c*) 1 T. & R. 496.

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tiff represented two classes having different interests, viz. those persons holding the same shares with himself, who had refused to pay the calls, and also those who had paid up the calls. That the interest of these two parties could not be identical, so as to render the relief prayed applicable to both; and therefore, there must be a misjoinder.

The following cases were cited:—*Mozley v. Alston* (*a*), *Foss* v. *Harbottle* (*b*), *Lord* v. *The Copper Miners Company* (*c*), *Richardson* v. *Hastings* (*d*), *Yetts* v. *The Norfolk Railway Company* (*e*), and *Harmer* v. *Gooding* (*f*).

Mr *Roundell Palmer* and Mr. *F. H. Goldsmid*, in support of the bill, contended that there was clearly a wrong, stated by the bill to have been done to the plaintiff, to which this Court could apply a remedy. That there had been a clearly inequitable exercise of the powers conferred on the directors, which fell within the jurisdiction of the Court to restrain. That the directors, even with the consent of the majority of the shareholders, could not, for fraudulent purposes, do that which, if intended for a *bonâ fide* purpose, they would be justified in doing. That, although the matter might be one of internal arrangement, this Court would interfere if the proceedings of the directors were fraudulent or beyond their powers: *Colman* v. *The Eastern Counties Railway Company* (*g*). That there had been a clear partiality shewn in favour of the shares held by the directors, to the destruction of those shares which the plaintiff possessed; and that this was a fraudulent exercise of their powers by the directors. That, if the same amount of calls were equally made on all the shareholders, more money would be subscribed than the directors were authorised

(*a*) Ante, Vol. 4, p. 636.
(*b*) 2 Hare, 461.
(*c*) 2 Ph. 740; 1 Hall & T. 85.
(*d*) 7 Beav. 301.
(*e*) Ante, Vol. 5, p. 487.
(*f*) 13 Jur. 400.
(*g*) Ante, Vol. 4, p. 513.

to raise for the construction of the railway, considering the undoubted abandonment of a great part of the project. If, in consequence of such abandonment, a less total capital was to be raised, there ought to be a proportionate reduction in the value, or on the calls to be made on every share. That it was a question, whether the plaintiff was bound to pay any call: *Cohen* v. *Wilkinson* (*a*); the plaintiff, however, submitted to pay all calls fairly made. The Court would ascertain the proper amount to be paid by each holder, in respect of his shares, and enjoin any other call being made. That it was of no consequence that the majority of shareholders at a meeting voted a larger call on a certain class of shares than the facts justified; for such a vote could not bind the minority, any more than the vote of a majority could affect or alter the purposes for which the railway was intended to be made: *Re The Vale of Neath Brewery, Ex parte Morgan* (*b*), *Preston* v. *The Grand Collier Dock Company* (*c*). That the plaintiff had no remedy by calling a meeting of the Company; for although, under the Companies Clauses Consolidation Act (8 Vict. c. 16, s. 90), certain powers were given to the directors, subject to the control of general meetings, such general meetings had no retrospective effect over any call previously made: *The Exeter and Crediton Railway* v. *Buller* (*d*). As to the necessity of making those shareholders parties who had paid up their calls, it was contended, that the bill did not affect their rights, and that they were unnecessary parties; and that was sufficient allegation in the bill to protect it from any objection for want of parties: *Apperly* v. *Page* (*e*), *Milbank* v. *Collier* (*f*), *Wilson* v. *Stanhope* (*g*).

Mr. *Turner* replied.

(*a*) Ante, Vol. 5, p. 741.
(*b*) 1 Hall & T. 320; *S. C.*, 1 Mac. & G. 225.
(*c*) 11 Sim. 327.
(*d*) Ante, Vol. 5, p. 211.
(*e*) Ante, Vol. 4, p. 568.
(*f*) 1 Coll. 237.
(*g*) 2 Id. 629.

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Mr. *Roundell Palmer*, in the course of his argument, was about to refer to sections of the Act of 10 & 11 Vict. c. ccxxii, not set out in the bill; whereupon

Mr. *Turner* objected.

The MASTER OF THE ROLLS said, that, in arguing a demurrer, he had always understood the rule to be, that counsel must confine himself to the bill, and that he could only refer to such sections of the Act as were therein stated.

Mr. *Roundell Palmer* objected, that, by express enactment, the Act was declared to be a public Act.

His Lordship, however, said, that he did not think that altered the case, and that so much of the Act as the plaintiff intended to use should have been set out in the bill. He could not allow sections in a Railway Act, not stated in the pleadings, to be referred to, if any objection was made by the other side.

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The MASTER OF THE ROLLS.—The case which the plaintiff makes is, that, by an Act of Parliament passed in 1847, the capital of a Railway Company, incorporated with the Birkenhead, Lancashire, and Cheshire Junction Railway Company, became vested in that Company on the purchase of the shares. Such shares were made to consist of three classes, viz. of shares of the nominal value of 27*l.* 10*s.*, in respect of which nothing is due; shares of the nominal value of 22*l.* each, in respect of which 6*l.* 10*s.* is due; and shares of the value of 31*l.* each, in respect of which 21*l.* is due upon each from the holders. The different shareholders were entitled to profits in respect of the sum actually paid on these shares. The directors of the Company, as newly constituted, were elected according to the

provisions of the Act. A call of 1*l.* 5*s.* a share, payable in October, 1847, was made in respect of the shares of 31*l.*, and a call of 3*l.*, payable in December, 1847, was made in respect of the shares of 22*l.* each. In May, 1848, the directors made a further call of 2*l.* 5*s.* per share, payable in June, 1848, on the shares of 31*l.* each. The bill alleges, that James Bancroft and the directors formed a scheme to conduct the affairs of the Company, without regard to the general benefit of the shareholders, and in such manner as to benefit the holders of the shares of 27*l.* 10*s.* each and 22*l.* each, to the prejudice and injury of the holders of the shares of 31*l.* each; and that they took measures to obtain a majority in the board of directors to depreciate the market value of the shares of 31*l.* each, and to cause an alarm among the holders of such shares, with a view to induce those holders to consent to certain disadvantageous terms which they intended to propose for the relinquishment or modification of the interest of such shareholders, for the benefit of holders of shares of 27*l.* 10*s.* and 22*l.* each. An attempt to effectuate such a scheme was alleged to have been made at a general meeting in 1848, and afterwards by causing a bill to be introduced into Parliament; and that, an opposition being made by holders of shares of 31*l.* each, a meeting of the directors was held on the 10th of February, 1849; and that a resolution was then passed to make a call of 10*l.* per share in respect of the shares of 31*l.* each, one-half to be paid on the 16th of March, and the other half on the 16th of April then next. The bill alleges, that the call of 10*l.* was not required for the execution of the works of the Company intended to be executed, but was made only to intimidate holders of shares of 31*l.* each; and it is further alleged, that, in consequence of certain works being abandoned, the amount of the call actually required was not so great as the call which has been made, but that the call having been made, certain of the holders of shares of 31*l.* each, who

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had not paid up the money due on them, had made the payments required of them, but others have refused to do so, alleging the payments not to be required for the purposes of the Act. The bill set forth statements, from which it seems intended to be inferred that the call is unnecessary; and that the estimates of liability suggested as an excuse for the call, have been exaggerated; and that the real motive of the directors in making the call had been to injure the holders of the shares of 31*l.* each, by compelling them to consent to a relinquishment or modification of the interest which they have in their shares. It is charged, that the respective holders of shares of 27*l.* 10*s.* each and 22*l.* each artfully contrived to get a majority of votes over the holders of shares of 31*l.* each; and that, in consequence of the existence of such majority, most of the holders of shares of 31*l.* each have considered it useless to attend, and have not attended any meetings of the Company since August, 1848; and that the proceedings at all subsequent meetings of the Company have been wholly controlled by the holders of shares of 27*l.* 10*s.* and 22*l.* each.

The bill plainly proceeds on the notion, that it is within the jurisdiction of this Court to take the accounts and to make the inquiries necessary, for the purpose of ascertaining whether, under the circumstances which it is alleged the Company is reduced to, and it being a continuing concern, it is proper, with a view to the management of the affairs of the Company, to raise money by way of calls from shareholders whom the plaintiff assumes to represent, and who have never paid up the call, nor taken the trouble to attend the meetings in which the question, whether any such call was to be made, was discussed and determined. It appears to me, that the case can only be considered as an attempt to induce this Court to interfere in the internal management of the affairs of the Company, and to take on itself to determine the question what calls shall

be made, and to determine matters which ought to be determined by the shareholders themselves at general meetings.

The only foundation for relief in this Court is the allegation that the calls, in the circumstances that have happened, are not wanted; that the plaintiff, and other shareholders of a class to which he belongs, are or are likely to be defrauded by a scheme formed by the other shareholders, seeking in some way to benefit themselves and other classes of shareholders, to the prejudice of the plaintiff and those for whom he sues, and are proceeding to enforce calls on them in pursuance of such alleged fraudulent scheme. The bill contains many allegations of improper and fraudulent motives, and of an intention to prejudice one class of shareholders for the benefit of the others; but these allegations do not rest on any specific fact sufficient to support the imputations; and the plaintiff, so far from stating that any attempts have been made to bring the matters under the consideration of the shareholders at all, and to procure any resolution of the directors in the management of the affairs of the Company to be rescinded, states the contrary, and that most of the shareholders on whose behalf he sues have not attended the meetings, or made any attempt to correct errors that have been made.

It does not appear from facts distinctly alleged in this bill, that the holders of shares of 31*l.* each have made payments in proportion to the holders of the other shares, or that they are not now more in arrear than other shareholders, or that it might not be right and just to enforce payment of the calls complained of, either for the purpose of carrying on works which it may be necessary to complete, or for the purpose of paying debts or answering liabilities which must be provided for, and the plaintiff, not thinking fit to call or attend a meeting at which any question of this sort might properly be settled, prefers coming to this Court for an inquiry to ascertain whether any

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part and how much of the call of 10*l.* is required for the purpose for which the money so required is lawfully applicable, and for an injunction to restrain any proceedings to recover the amount of such call.

It is indeed alleged, that there is an intention to abandon part of the works for the completion of which the powers were granted to the Company. This may be quite unlawful, —probably it is so,—but that is not sufficient to shew that the enforcement of the call may not be necessary for lawful purposes. And even supposing the plaintiff to have some well-founded reason for complaining of what has been done, it appears to me he cannot have the remedy he asks. This bill contemplates the continuance of the Company for at least some of the purposes for which it was incorporated, and the maintenance of some of the works it was authorised to make; and it would be impossible for this Court to maintain jurisdiction in such a case as this, without assuming authority to interfere in the internal management of all Companies and partnerships whenever a question arose as to the proper amount of the call required for the lawful purposes of the Act.

I am therefore of opinion that the plaintiff is not entitled to any relief on this bill, and that the demurrer for want of equity must be allowed. I think the bill is defective also for want of parties, inasmuch as the plaintiff sues on behalf of all the holders of shares of 31*l.* each, as well those who have paid the calls as those who have not; and it is also defective in not alleging, as it ought to do under the circumstances, that the holders of the other shares are duly and fully represented by the defendants. The demurrer must therefore be allowed.

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BEFORE VICE-CHANCELLOR WIGRAM AND THE LORD CHANCELLOR.

ADAMS *v.* THE LONDON AND BLACKWALL RAILWAY COMPANY.

May 5th.
1850.
July 4th.

A Railway Company gave notice to the lessees of certain property, required by them for the purposes of their railway, of their intention to take and purchase a portion of the premises, and, after the notice, a treaty was commenced, and an agreement entered into on certain terms. Both parties afterwards waived the agreement, and the Company, being desirous of entering into immediate possession, complied with the terms of the 85th section of the Lands Clauses Consolidation Act,

THE plaintiffs in this cause were the lessees for a long term of years of certain premises situate in the parish of St. Mary, Stratford-le-Bow, in which they lived, and carried on the business of engineers. The bill, after setting forth the different Acts of Parliament by which the London and Blackwall Railway Company were incorporated, stated, that on the 19th of July, 1847, the London and Blackwall Railway Company having required a portion of the plaintiff's premises for the purposes of their Act, gave them the usual notice demanding the particulars of their estate and the amount of their claim, and offering to treat. That the Railway Company subsequently abandoned and repudiated their notice of the 19th of July, and on the 9th of November served on the plaintiffs' solicitor another notic dated the 8th of November, requiring all the land contained in the first notice and some additional portion of the plaintiffs' premises; and at the foot of the notice that part of the 21st section of the Lands Clauses Consolidation Act was set out, which provides, that if for twenty-one days after the service of notice a party should fail to

and entered. The plaintiffs thereupon filed their bill, praying that the Company might be directed to complete their purchase, and to take all necessary proceedings for that purpose. To this bill the Company demurred, on the ground that the initiative, under the 68th section of the Lands Clauses Consolidation Act, must be taken by the lessees; and also on the ground that the plaintiffs had a remedy by mandamus:—*Held*, by the *Lord Chancellor* (*a*), overruling the decision of *Wigram*, V. C., that the demurrer be allowed. That, although an old jurisdiction is not taken away by a new remedy, yet, if a new right be given, and a special remedy provided for enforcing it, such remedy must be pursued.

Semble, that the Parliamentary notice alone does not constitute the relation of vendor and purchaser, so that the Court will enforce the performance of all the incidents to that relationship, as in ordinary cases.

(*a*) Lord Cottenham.

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state the particulars of his claim, the amount of compensation should be settled in the manner provided for by the said Act.

The plaintiffs sent in their claim on the 30th of the same month of November, and negotiations and correspondence took place between the solicitors of the plaintiffs and those of the Company with respect to the amount of compensation; and on the 24th of February following a meeting of the parties took place, whereat it was agreed that a deduction should be made in the rent payable by the plaintiffs, and that they should receive in all the sum of 956*l.* as compensation for their interest; and a memorandum in writing was then signed by the respective surveyors of the Company, the reversioners, and the lessees, (the plaintiffs).

That, after the adjustment of the plaintiffs' claim, the Company's surveyor stated that they required and were desirous of purchasing the remaining portion of the plaintiffs' premises. The plaintiffs at first absolutely refused to sell, but, after some correspondence between the parties, they agreed to do so upon the express condition that the Company should procure for the plaintiffs other land commodious for their business and suitable for building.

That great delay took place on the part of the Company, and pending their negotiations the Company commenced works for the construction of their railway, whereby the plaintiffs, as they alleged by their bill, sustained great inconvenience.

That, previous to the 13th of June, 1848, an understanding existed between the Company and the plaintiffs, that, in case the proposed purchase of the whole of the premises should not be completed, the agreement of the 24th of February should remain in full force; but on the 13th of June the Company repudiated that agreement, and by a letter sent to the plaintiffs in June, 1848, they stated that the delay which had taken place had not been occasioned by any

uncertainty of purpose on the part of the Company, but from the endeavours used by them to obtain for the plaintiffs a piece of ground. That the Company had not been put in possession of any part of the ground, and could not therefore recognise any claim for allowance in respect of loss of rent.

The Company afterwards by letter stated, that they should confine themselves to the land mentioned in their second claim, and they would be glad the matter should be settled as soon as convenient.

The parties having failed to come to any arrangement, the Company, on the 30th of June, 1848, sent the plaintiffs a notice, that, if they did not consent to their entry upon the land, they should proceed under the powers of the Lands Clauses Consolidation Act, and, the plaintiffs having refused to sanction the entry by the Company, they had a surveyor appointed under the 85th section, who valued the plaintiffs' interest at 100*l*. The Company deposited that sum in the Bank of England, gave the plaintiffs a bond for that amount, and on the same day entered upon the lands.

The Company then proposed the names of three persons to settle the question of compensation, whereupon the plaintiffs wrote a letter to the Company, which was in part as follows:—"In conclusion we have to add, that as our former claim is repudiated by the Company, we do not consider ourselves bound by it. We have now sustained further injury and loss at the hands of the Company, for which we claim compensation from them. We will consult our solicitor as to your proposal to refer the question between us."

The parties not being able to agree to a reference, the plaintiffs, in October, 1848, and at various times subsequently, requested the Company to take the necessary steps to summon a jury, in order to decide the question at issue between them.

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The bill charged, among other things, that although the plaintiffs were ready to have accepted the sum of 956*l.* by way of purchase-money and compensation for their interest, yet that that agreement having been repudiated by the Company and waived by the plaintiffs, the same was not then binding on plaintiffs or on the Company; and that the plaintiffs were entitled to have the amount of the purchase-money or compensation ascertained by a jury, pursuant to the provisions of the Lands Clauses Consolidation Act; but that the Company had never taken any steps to summon the same.

That, by the service of the notice of the 8th of November, 1847, a good and binding contract to purchase the plaintiffs' interest was constituted as between the plaintiffs and the Company, and that the Company ought to be compelled to perform the same.

The bill prayed, that it might be declared that the London and Blackwall Railway Company ought forthwith to complete the purchase of plaintiffs' estates and interests in the premises required by the notice of the 8th of November, 1847; and that, for the purpose of ascertaining the amount due to the plaintiffs in respect of their rights and interests in the premises, and for damages consequent on the taking of the premises by the Company, the London and Blackwall Railway Company might be decreed forthwith to take all fit and proper proceedings, in order that the amount of the purchase-money and compensation might be determined and settled, according to the provisions of the Lands Clauses Consolidation Act; and that all necessary directions might be given for that purpose; and that the amount, when ascertained, might be paid by the Company to the plaintiffs or to the persons entitled thereto, under the directions of the Court, or be dealt with according to the provisions of the Lands Clauses Consolidation Act, &c.

To this bill the Railway Company demurred generally.

Mr. *Wood* and Mr. *Bigg*, in support of the demurrer.—There is a great distinction between this case and that of *Walker* v. *The Eastern Counties Railway Company*(*a*); in that case the plaintiff had taken every preliminary step to establish an equitable contract, but in this case the plaintiffs had waived their claim, and the only contract created by the notice is an implied one to buy the plaintiffs' land, according to the form of the Act. The plaintiffs' right is founded on the Act, and if the Company do not proceed according to it, the plaintiffs can at common law obtain a mandamus to compel the Company to proceed. If the plaintiffs were now to send in their claim, every remedy is given them by the Act; and this Court will not give its assistance in cases where an ample legal remedy is provided *aliunde*. Under the 68th section(*b*) of

(*a*) Ante, Vol. 5, p 469.

(*b*) Sect. 68 enacts, that, "if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l*., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands, in respect of which he claims compensation, and the amount of compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; and if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be

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the Lands Clauses Consolidation Act, the Company have twenty-one days after claim sent in, to decide whether they will pay the amount claimed or summon a jury. A decree according to the prayer of the plaintiffs' bill would deprive the Company of their rights under the Act. If the plaintiffs are entitled immediately to the relief they now seek, every landowner on whom a Railway Company has served a notice to take their lands, might the very next day after such notice, file his bill in this Court, with as much right to success as the present plaintiff.

The *Solicitor-General* and Mr. *J. H. Law*, in support of the bill.—The same case is made by the present bill as in *Walker* v. *The Eastern Counties Railway Company*. The right of the plaintiffs is founded on the contract created by the defendants' notice, and the only question is, how the plaintiff is to obtain specific performance of that contract. The 68th section does not apply to cases provided for by the foregoing sections, where land is originally taken, but is intended as a means of giving compensation to those whose lands are inadvertently taken or injured by the Company's works. In every case where lands are taken by the Railway Company, except under the 68th section, the Company are compelled to take the initiative, and it is not incumbent on the landowner to send in a claim: *Beardmer* v. *The London and North Western Railway Company* (*a*), *Stone* v. *The Commercial Railway Company* (*b*), *Webb* v. *The Man-*

willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same, in the manner herein provided; and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts.

(*a*) Ante, Vol. 5, p. 728.

(*b*) Ante, Vol. 1, p. 375.

chester and Leeds Railway Company (*a*), *Withey* v. *Cottle* (*b*), *Adderley* v. *Dixon* (*c*), *Weale* v. *The West Middlesex Waterworks Company* (*d*).

Mr. *Wood* replied.

May 5th.

The VICE-CHANCELLOR.—In this case the plaintiffs, at the time of filing the bill, were entitled to the possesion of some leasehold property, which the Railway Company were desirous of taking for the purposes of their railway; and the right of the Company to take the property in question is not, I think, in dispute. On the 9th or 10th of November, 1847, the Company gave the notice required by the Act of their intention to take the land which is the subject of this suit. A previous notice had been given of the intention of the Company to take a less quantity than that comprised in the latter notice; but, according to the statement in the bill, the second notice comprised all the land in the first notice, and something more. There is no question raised in the pleadings as to the right of the Company to abandon the first notice; and I understand the bill to admit that the second notice was a valid notice if duly followed up, and binding on the plaintiffs, and would have entitled the defendants to take the lands in question. After this notice of November, 1847, a treaty took place between the Company and the plaintiffs, and also the lessor of the plaintiffs, and agreements were come to, under which the interest of the landlord, and also the rights and interests of the plaintiffs were to be satisfied; and, if the allegations in the bill be true, it appears that an agreement was concluded between the plaintiffs and defendants, settling the terms on which the Company were to take the land.

If I am at liberty to consider that agreement as being in

(*a*) Ante, Vol. 1, p. 576.
(*b*) 18. & S. 174; *S. C.*, 1 Turn. 78.
(*c*) 1 S. & S. 607.
(*d*) 1 J. & W. 358.

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force between the Company and the plaintiffs, I apprehend that it would be a case about which there would be very little question as to the jurisdiction of the Court attaching; but, according to the allegations of the bill, I understand the plaintiffs' case is, that, although they insist the agreement was come to, yet they waive their rights under that, and were content, long before the filing of the bill, to take the price of the land when settled by a jury. The Company having then the second notice, the first having been abandoned, and the agreement I have mentioned being put out of the case by the statement in the bill, the question is, what, in that state of things, it was the duty of the Company to do. Now, the duty of the Company was, to have issued a warrant to the sheriff, requiring him to summon a jury to ascertain the value of the land, or the price to be paid by the Company to the plaintiffs. That step has not been taken; and if the case had rested there, I apprehend that there is no doubt that it would have been within the case of *Walker* v. *The Eastern Counties Railway Company*. The parties, however, went on treating for some time, and what followed was this:—the Company being desirous of taking immediate possession, caused a value to be put by a surveyor, according to the terms of the Act of Parliament, on the property; they deposited that money in the way required by the Act of Parliament, as a security for the price, and became entitled thereupon to enter into possession. Although they had not paid for the land, and the price was not actually ascertained, some treaty went on, but the result was, that the plaintiffs wrote a letter to the defendants, in which they called on them and required them to serve their warrant to the sheriff to impannel a jury; and on that the parties split. The Company said, that the case was too simple to require that expense: that they would not do it; and therefore the bill was filed.

Two grounds of defence were made on the part of the Company. One was the general ground, that this Court has no jurisdiction to enforce the performance of contracts relating

to lands as between Railway Companies and those parties whose lands they take under the Act of Parliament; for that the proper remedy was by mandamus. The other ground was, that, if that were so, the state in which the case is found at the time the bill was filed, and also from the statement in the bill, the plaintiff was the party on whom, according to the true construction of the Act of Parliament, the *onus* to take the next step was cast, towards ascertaining the price; and it is agreed, that, if that were the case, then the Company were not in default; and therefore, even if the first point, that which denied the jurisdiction of the Court, were not well taken, still that the bill could not be sustained. Supposing the case to have stopped with the notice and failure of treaty, there is no doubt the *onus* was on the Company. The Company, however, have got into possession under the clauses of the Act(*a*) which empower the Company to get into possession without having paid the price. The 68th section says, that where the Company have taken possession of lands or have otherwise injuriously affected lands belonging to other persons, then such persons may call on the Company to call out a jury; and the question was, whether this case was within the 68th section.

I should be most reluctant to decide, and certainly will not decide without being compelled, that this case is not within the 68th section, because I cannot help thinking that the 68th section was intended to cover every case in which the Company, whether by right or wrong, or by any other means, had got into possession of property for which they had not paid, or in the exercise of the powers of the Act of Parliament had injuriously affected the property of others, for which injury they were bound to make compensation,—*primâ facie*, that is the obvious meaning of the 68th section; but that does not appear to me to de-

(*a*) 84th and 85th sections of the Lands Clauses Consolidation Act, 8 Vict. c. 18.

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cide the case. It is a privilege, and a privilege of great importance in some cases, that the owner of land has a right to throw on the Company the taking the initiative in the making an offer of the price and the summoning a jury; and the question is not, whether the plaintiffs might not have proceeded under the 68th section, if they had desired it; but, taking it for granted that the *onus* was on the Company to issue a warrant to the sheriff and to summon a jury, whether that *onus* is discharged by the Company having claimed the benefit of those provisions of the Act of Parliament which enable them, in certain cases, making a deposit by way of security only, to take possession without having paid the price.

It appears to me the two cases are perfectly consistent. The Court may give the plaintiffs a right to proceed, and that right may make it a matter of grave consideration in what way the Court will deal with the question of costs, if any costs are occasioned. But the question I have to decide is, whether that right conferred on the plaintiffs deprives them of the benefit which they would have, if the Company were discharged of the obligation to take the steps pointed out by the Act of Parliament to ascertain the price to be paid. I do not think that this 84th section, and the other clauses, will discharge the Company from the obligation, if the party in terms required them to exercise it; and the other one does pointedly and in terms direct it. I think the case is not one in which I can refuse the jurisdiction of the Court, if the Court has the right to exercise the jurisdiction. Now, the question before me is, not that I should decide whether the Court has jurisdiction or not, but this demurrer requires me to decide this abstract point, that the Court has no jurisdiction. If the Court can have any jurisdiction whatever, at the hearing, on the ground of the peculiarities of the case, then I cannot hold the demurrer is sustainable. With reference to the question, whether the

Court has jurisdiction or not to interfere between the Railway Company and persons from whom they purchase land—I certainly retain the impression I have stated twice already, which is, that it is very inconvenient that parties should come here, if they can by means of a mandamus get that to which they are entitled; but on the question of denying the jurisdiction of the Court, the way the case strikes me is this—adhering to what I said about the rule of law, that where an Act of Parliament confers a right, and at the same time gives a remedy, there is great authority for saying that the party is confined to his remedy, but where the Act of Parliament does not prescribe a specific remedy for enforcing the right, it has always been held, that the parties are entitled to any remedy either at law or equity, which in a case of a similar kind they would have when the question arises otherwise than under the Act of Parliament.

If, after notice given by the Company to take any land, and after tendering the price, the owners should attempt to deal with property in a manner injurious to the Company, and refuse to execute the conveyance as the Act requires, or in the simple case, that of refusing to execute the conveyance, it appears to me to be impossible to deny the jurisdiction of the Court. Then, if in that case the Court will do it, the question is, whether the converse case, in which the vendor is the plaintiff, does not follow. Certainly my impression is, whether the reason is satisfactory or not, that the Court has always said, that without proving a special case the vendor may always come simply to recover the purchase-money and interest, whether he shews a case of special damage for which the law would make compensation or not; and for that the cases of *Withey* v. *Cottle*(*a*), and *Adderley* v. *Dixon*(*b*), and what Sir *E. Sugden* said, appear to me to be sufficient authorities. The Act of Parliament does not mention what I thought it did, the word " man-

(*a*) 1 S. & S. 174; *S. C.*, 1 Turn. 78. (*b*) 1 S. & S. 607.

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damus." It simply gives a right, and does not give a remedy for enforcing the conveyance or the payment of the purchase-money, and therefore you must either go to a court of law for a conveyance, or come here for a decree in the case of parties filing a bill. The conveyance being refused, or injury done to the property, the party might come here and ask for the conveyance in the simple case; and, if so, certainly according to my apprehension the jurisdiction of the Court attaches. I must therefore overrule this demurrer.

From this judgment the defendants appealed to the Lord Chancellor, and the case was again argued by the same counsel as in the Court below. On the 4th of July, the Lord Chancellor delivered to the parties in the cause the following judgment in writing:—

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If from the terms of the prayer of the bill, and the fact that a demurrer to it has been overruled, it should be inferred that this Court will generally lend its assistance to compel the performance of the provisions of the Acts under which railways are formed and maintained, a proposition would be raised, which, if established, would lead to consequences of the most serious importance. I do not, however, think that any such inference can fairly be drawn from the decision of Vice-Chancellor *Wigram* in this case, because upon an examination of what fell from his Honor in giving judgment, it will, I think, be found, that it turned much upon the special allegations in the bill constituting, in his Honor's opinion, a statement of fact different from what appears to me to be the true construction of such statement. His Honor considers the case stated in the bill to amount to this: that the Company had given the notice No. 2, and had not proceeded to summon a jury under the Act; in which case his Honor thought that this Court had jurisdiction to enforce the further proceedings, resting upon the case of *Walker* v. *The Eastern Counties Railway Com-*

pany (*a*). As I do not consider this to be the true construction of the facts as stated in the bill, I shall abstain from any observations upon the supposed rule of law, or the case referred to, and propose, first, to examine the various allegations of the bill, shewing the relative situation of the parties, and then to consider the provisions of the Act of 1845, as applicable to the facts so stated.

The bill states the first notice, and the claim of the plaintiff, but that notice was abandoned, and the second notice, of the 8th of November, 1847, substituted for it, upon which the plaintiffs, according to the provisions of the Act, put in a claim, dated the 30th of November, 1847, claiming 766*l.* and a deduction of 86*l.* from their rent of 136*l.*, which led to a negotiation, terminating in an agreement under which the plaintiffs were to receive 956*l.* compensation, and have a deduction of 74*l.* from the rent; but this agreement having been afterwards repudiated by both parties, and the bill not praying any relief under it, but adversely to it, forms no part of the case now existing between the parties. The bill then, after stating that a negotiation had taken place, for the purchase by the Company of other premises, with which the plaintiffs refused to proceed, and that they never agreed to an arbitration, and that they repudiated their former claim, and were not bound by it, further injury having been sustained, and that the Company had done the same, proceeded to state fruitless negotiations for a settlement by arbitration. That the plaintiffs ultimately abandoned the course of proceeding, and called upon the Company to take the necessary steps within one month to summon a jury, in order that the question at issue might be decided by them.

The bill having stated a notice, dated the 30th June, 1848, given by the Company for taking possession before payment, under the 85th section of the Lands Clauses Consolidation Act, and the proceedings accordingly, and pos-

(*a*) Ante, Vol. 5, p. 469.

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session taken, alleged, that the estimated amount of compensation and damages under that proceeding was founded in error, and the plaintiffs were entitled to much more, and to a larger amount than their former claim. From this short abstract it will be seen, that the only facts subsisting between the parties, which can affect their rights, are the second notice, of the 8th of November, 1847, and the notice of the 30th of June, 1848, and the proceedings which followed under the 85th clause of the Lands Clauses Consolidation Act, the claim of the plaintiffs under the second notice, and the agreement which followed it, having, as the bill alleged, been repudiated and abandoned by both parties, and forming no part of the plaintiff's case. Such, therefore, are the facts to which the law, which is to be found in the Lands Clauses Consolidation Act, is to be applied.

The Lands Clauses Consolidation Act, 8 Vict. c. 18, after providing the means by which the value of the land required by the Company is to be ascertained by section 84, prohibits the Company from taking possession until such value shall have been paid or secured as thereby provided, and by the 89th section, imposes severe penalties for their so taking possession; but by section 85, when a Company is desirous of possession, before any agreement has been entered into, or award made, or verdict given, it is authorised so to take possession, upon payment into the Bank of the sum claimed or fixed by a surveyor appointed by two justices, as the value of the property, and giving a bond with sureties for payment of the purchase-money and compensation, to be ascertained under the provisions of the Act; and by the 68th section, any party entitled to land taken or injured by the Company, for which they have not made satisfaction, is to give notice to the Company, stating his interest in the land and the compensation he claims, and whether he wishes to proceed by arbitration or before a jury, and if the latter, the Company are to pay the sums claimed, and enter into an agreement for the purpose,

or issue their warrant for a jury, within twenty-one days after the notice, and in default, are made liable to pay the compensation claimed, which the party is to recover by action in one of the superior courts, with costs.

The Vice-Chancellor seems to have considered, that, notwithstanding the provisions of the 68th section, and the taking possession under the 85th section, the relative positions of the parties is to be considered as if nothing had taken place beyond the notice of the 8th of November, 1847; and, that such notice having constituted the relation of vendor and purchaser, this Court could enforce the performance of all the incidents to that relationship. It is, I think, quite true, that, to a certain extent, and for certain purposes, the compulsory taking of lands under the Railway Acts, place the Companies and the owners in the relative situation of purchasers and vendors, such as fixing, as between them, the lands to be taken, which was all that was decided in *Stone* v. *The Commercial Railway Company* (*a*); but it by no means follows that this Court will therefore take on itself the specific performance of such sales. If, indeed, the proceedings lead to an agreement, the Court might do so for them, although, originating in the compulsory power, the purchase would be to be effected under a private agreement; and so other cases may arise, but, whether if the case depended entirely upon the notice of taking the land, not followed by any agreement, or indeed by any claim on the part of the owner,—for such is the present case, as stated by the bill,—the amount of purchase-money, therefore, not being ascertained, is a question upon which I do not think it necessary to express any opinion, because I think that the circumstances of this case call for a decision, founded upon very different principles.

It was properly observed in argument, that the power of summoning a jury was by the Act given exclusively to

(*a*) Ante, Vol. 1, p. 375; *S. C.*, 2 My. & Cr. 122.

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the promoters, and that the owner of the land had no power under the Act, of compelling them to do so; and therefore, the Court's original jurisdiction over contracting parties, might be exercised, for the purpose of giving to the owner that compensation to which he is under the Act entitled, which assumes, that such original jurisdiction existed. The fact seems to be, that the legislature having prohibited the promoters from interfering with the land until the compensation was paid or secured, considered that this afforded sufficient security to the owner, that the promoters would proceed to have the value ascertained by a jury; for this Act adopts a very different course, when such pressure would not exist as under the 68th section. In the case provided for by that section, the promoters being in possession, and not having paid the compensation, are not left to their own discretion, or to the pressure of their own wants, to induce them to summon a jury; but a remedy, prompt and effectual, is given to the owners, to compel them to do so. It is to make a claim, stating the amount of compensation required, and if the promoters do not enter into an agreement to pay the same, or within twenty-one days issue their warrant for a jury, they are to be liable to pay the sum claimed to be recovered, with costs, in an action in one of the superior courts.

That the situation of the parties is precisely that contemplated by this 68th section is, I think, very clear; for I concur with Vice-Chancellor *Wigram* in thinking, that this 68th section applies to cases in which possession has been taken under section 85; but if that be so, the initiative for summoning a jury is not cast upon the promoters, but upon the owner, who is to make his claim, and thereby give the promoters an opportunity of settling his demand without litigation, and the owner has the remedy of having his claim converted into a right, if the promoters shall delay for twenty-one days, for which he has a remedy by action.

Now, although an old jurisdiction is not taken away by

a new remedy being given, yet if a new right be given, and a special remedy provided for enforcing it, such remedy must be pursued. Here, then, is clearly a new right, that is, a right to compensation for land lawfully taken possession of by another; under the powers of the Act, a remedy is also given, for the owner has only to make a claim and he obtains a legal title to all he claims, unless the promoters can reduce it by the verdict of a jury. The Vice-Chancellor seems to adopt this view of the case; and if the 68th section had been considered by him as regulating the rights of the parties, he would not, I apprehend, have overruled the demurrer; he was, however, of opinion, in conformity with his decision in *Walker* v. *The Eastern Counties Railway Company* (*a*), that the notice of the 8th of November, 1847, having given to this Court jurisdiction as a contract of purchase, the 68th section had not taken it away, but that the owner was at liberty to resort to his position under the notice.

Now, abstaining from giving any opinion as to the effect of that position, in giving this Court jurisdiction when nothing more has been done, I think that what subsequently took place in the present case essentially altered the position of the parties. The Act does not consider the notice as constituting a contract, but as a preliminary step to bring the parties together, who are afterwards to settle the matter between them by agreement, arbitration, or the verdict of a jury. In the present case the notice by the promoters was met by a claim on behalf of the owners, and a regular agreement, according to the statement in the bill, entered into between the parties. So far the object of the notice of the 8th of November, 1847, had the effect intended by the Act in procuring from the owner a statement of his claim, and the making an agreement between the parties; but subsequently this agreement was repudiated by both

(*a*) Ante, Vol. 5, p. 469.

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parties, and the claim abandoned. Under these circumstances, the promoters finding that no progress was making, under the earlier provisions of the Act, resorted to the provisions of the 85th section, which, with the aid of the 68th section, was calculated to lead to some settlement. But the plaintiff by his bill seeks to proceed under the earlier provisions of the Act, and calls upon the Court to compel the promoters to issue their warrant for a jury. By the 21st section they are only to do this if no claim is made and no agreement come to, but the bill alleges that a claim was made and an agreement concluded. It cannot be that the notice *per se* gives the Court jurisdiction: if this were so, the jurisdiction would arise as soon as the notice was given; but at that time three modes of proceeding are, under the Act, open,—agreement, arbitration, and a jury,—the latter only in the event of the two former not taking effect. At the time, therefore, of the notice being given, it is uncertain which course will be adopted, and the Court has therefore no guide as to what course it ought to enforce. It is only after the time for an agreement or arbitration has expired that the jurisdiction to enforce proceedings before a jury can arise; but that time cannot ever arrive when a valid agreement has been entered into.

It appears to me, therefore, that what has taken place between these parties takes this case out of the principle of the decision in *Walker* v. *The Eastern Counties Railway Company*, and that the rights of the parties are to be regulated by the 85th section, which, with the aid of the 68th, gives to the owner a short and simple remedy for compelling compensation from the promoters, and that he has this remedy in addition to his right to a mandamus, both being remedies much more prompt and efficacious in such a case as this, than a suit in equity, and attended with much less expense. I am, therefore, of opinion that the demurrer ought to have been allowed, and I must reverse the order appealed from.

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BEFORE THE MASTER OF THE ROLLS.

Nov. 23rd.
Dec. 4th & 8th.
1850.
Jan. 12th.

SALOMONS *v.* LAING.

A Railway Company, incorporated by Act of Parliament, is bound to apply all the monies and property for the purposes directed and provided for by the Act of Parliament, and not for any oth purpose whatever. If, after the expenses are paid, and the public purposes directed and provided for by the Act are fully performed, any surplus remain, such surplus, after setting apart a sufficient sum to answer contingencies, may, if not applied in enlarging, improving, or repairing the works, be divided among the shareholders.

The dividends which are divisible among the shareholders must be considered as their own property, and cannot be applied by the directors to any purposes not included in the Act, without the express sanction of each shareholder.

A Railway Company became, by virtue of certain Acts of Parliament amalgamating them with four other Companies, possessed of a certain number of shares in an unfinished line of railway. The amalgamated Company afterwards purchased, with monies of the Company, more shares in the same line, and had them transferred into the names of three of their directors. They also negotiated with the directors of the unfinished line for the purchase out of the funds of the Company of a portion of that line which had been completed.

A bill was filed by a shareholder, on behalf of himself and all other shareholders, in order to render the defendants, who had purchased the additional shares in the unfinished Company, personally liable for them, and to restrain the completion of the contract for the purchase of a finished portion of the same line.

To this bill the defendants demurred, for want of equity and for multifariousness:—*Held*, by the Court, overruling the demurrer for want of equity, that, although the two transactions were clearly illegal, yet, as they were not alike, either with respect to the persons affected by them, or with respect to the relief which might be given, that the demurrers for multifariousness should be allowed, with liberty to amend (*a*).

(*a*) See continuation of this case, post, p. 303.

THE bill in this case was filed by D. Salomons, the original owner of 49 shares in the London, Brighton, and South Coast Railway Company, and of 100 shares in the same Company, which he had acquired by purchase, on behalf of himself and all other shareholders in the said Company, and was against S. Laing, the chairman of the London, Brighton, and South Coast Railway Company, L. Schuster, the deputy-chairman, and W. Cash, C. S. Crowley, E. Crowley, G. F. Hotham, J. Lawrie, J. Nix, and J. Whishaw, all directors of that Company, of whom W. Cash, C. S. Crowley, G. F. Hotham, J Lawrie, J. Nix, and L. Schuster, were also directors of, and W. Cash and J. Whishaw were shareholders in, the Direct London and Portsmouth Railway Company, and against William A. Wilkinson, and the Direct London and Portsmouth Railway Company.

The proceedings in this case arose out of certain trans-

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actions between the London, Brighton, and South Coast Railway Company (hereafter, for the sake of brevity, called "The Brighton Company"), and the Direct London and Portsmouth Railway Company (for the same reason called "The Portsmouth Company").

It appeared from the statements in the bill, which are, as far as necessary, set forth in the judgment, that the London and Croydon Railway Company had, some time previously to the passing of the Act for consolidating with them the London and Brighton Railway Company, become possessed, by some means unknown to the plaintiff, of 2033 shares in the Portsmouth Company, and the same were at the time of the passing of the Act, standing in the names of three of the then directors of the London and Croydon Company, namely, W. A. Wilkinson, B. Baines, and J. Lawrie, who admitted themselves to be trustees thereof, for the Brighton Company.

It further appeared, with respect to the purchase of shares, and also in respect to an alleged agreement to purchase a completed part of the Portsmouth Railway, that the Portsmouth Company, being unable to raise sufficient capital to prosecute their scheme, had entered into some agreement with the Brighton Company, whereby they had arranged to complete a portion of the Portsmouth line, as far as Leatherhead, and to supply the funds for that purpose, and also to pay the sum of 20,000*l.*, by way of compensation for the preliminary and parliamentary and other expenses of the Portsmouth Company, in respect of the portion of the railway they had agreed to complete, and that an application should be made to Parliament, to permit the purchase by the Portsmouth Company of that portion of the line for the sum of 50,000*l.*, which included the 20,000*l.* which was agreed to be paid under any circumstances.

It also appeared that 4000 shares, and afterwards 677 shares in the Portsmouth Company had been taken and

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subscribed for by three of the directors of the Brighton Company; and it was alleged that the payments in respect of such shares, and the sums payable under the agreement, were, in fact, to be paid out of the funds of the Brighton Company.

The bill prayed that it might be declared that it was not and is not within the powers of the Brighton Company, or of the directors thereof, to subscribe for or purchase, on behalf and out of the funds of such Company, any shares in the Portsmouth Company; and that it might be declared that the defendants L. Schuster, E. Crowley, and G. F. Hotham ought to be taken and considered as having subscribed for and purchased the aforesaid 4000 shares and 677 shares in the Portsmouth Company on their own personal account, and not as trustees for the Brighton Company; and that it might also be declared that the aforesaid agreement or arrangement between the directors of the Brighton Company and the directors of the Portsmouth Company, respecting the proposed railway from Epsom to Leatherhead, was not within the powers of the Brighton Company, or of the directors thereof, but that the same was illegal and void, and that the same, if necessary, might be delivered up to be cancelled; and that the defendants L. Schuster, E. Crowley, and G. F. Hotham, and also the defendant W. A. Wilkinson, and also such of the defendants S. W. Laing, W. Cash, C. S. Crowley, J. Lawrie, J. Nix, and J. Whishaw, as joined or concurred in any of the aforesaid illegal payments out of the funds of the Brighton Company, might respectively be decreed to replace and to repay to the funds of the Brighton Company the sums which had already been paid, and any other sums which might be paid, out of the funds of such Company, for or in respect of the aforesaid 4000 shares and 677 shares in the Portsmouth Company, or any of them, together with interest thereon after the rate of 5*l.* per cent.; and that the defendants Laing, Schuster, Cash, C. S. Crowley, E. Crowley,

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Hotham, Lawrie, Nix, and Whishaw respectively might be also decreed to replace and repay, in like manner, all sums which had or might be paid out of the funds of the Brighton Company, under or in pursuance of the aforesaid agreement or arrangement with the directors of the Portsmouth Company respecting the said proposed railway from Epsom to Leatherhead; and that proper directions might, if necessary, be given for causing the aforesaid 2033 shares in the Portsmouth Company, which formerly belonged to the London and Croydon Company, to be forthwith sold, and for bringing the proceeds of such sale to the funds of the Brighton Company; and that the defendants Laing, Schuster, Cash, C. S. Crowley, E. Crowley, Hotham, Lawrie, Nix, and Whishaw might be respectively restrained from taking any further steps to carry out the aforesaid illegal agreement or arrangement with the Portsmouth Company respecting the proposed railway from Epsom to Leatherhead, and also from applying any of the monies or funds of the Brighton Company in payment of the said sum of 20,000*l.* or any part thereof, or in payment of any further calls or call on the aforesaid 4000 shares and 677 shares, or any of them; and that the defendants Laing, Schuster, Cash, C. S. Crowley, E. Crowley, Hotham, Lawrie, Nix, Whishaw, Wilkinson, and the Portsmouth Company, and Brighton Company, might be ordered to pay the costs of this suit; and for general relief.

To this bill the defendants Laing, Schuster, Cash, C. S. Crowley, E. Crowley, Hotham, Lawrie, Nix, and Whishaw, and the Brighton Company, put in a demurrer for want of equity and multifariousness; and a similar demurrer was also filed by the defendants W. A. Wilkinson and the Portsmouth Company.

Mr. *Roundell Palmer* and Mr. *Bovill*, in support of the demurrer, on behalf of the Brighton Company, contended, that, as they had become rightly possessed of 2033 shares

in the Portsmouth Company, the directors had assisted the Portsmouth Company, in order that the shares which had become the property of their Company might not be rendered valueless by the total failure of the scheme. That, in this they were not exceeding their powers, but applying the means of the Company towards the furtherance of a legal object, viz. the preservation of the subsisting interests of the Company. That the 120th and 122nd clauses of the Lands Clauses Consolidation Act applied only to capital, whereas it did not appear by the statements in the bill that the sums agreed to be paid to the Portsmouth Company were not out of the earnings of the concern. That there was nothing to prevent the application of the dividends or profits in the concern being applied, with the consent of the majority of the shareholders, to any scheme of which they might approve. That the decisions in the cases thitherto decided had been based on an application of the capital to purposes not authorised by the Act, and the Court had rightly interfered to prevent illegal acts by the directors; but in this case there was nothing in the bill to shew that one farthing of the capital of the Company was about to be applied. That the scope of the bill went to shew that the Company were improperly applying the funds, and yet no relief was prayed against the Company except as to costs. That the case was in fact made against the three directors of the Company, and the Company not being shewn to have been a party, or to have consented to their transactions, ought, if there had been any just cause of complaint, to have been the plaintiffs: *Foss* v. *Harbottle*(*a*), *Mozley* v. *Alston*(*b*). That there was no sufficient allegation in the bill to shew that the directors, who entered into the agreement for the purchase of shares, had done so on behalf of the Company, or so as to bind the Company. That, in *Colman* v. *The*

(*a*) 2 Hare, 461. (*b*) Ante, Vol. 4, p. 636.

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Eastern Counties Railway Company (*a*), there was sufficient allegation to shew that the acts of the contracting parties were the acts of the Company; and in *Cohen* v. *Wilkinson* (*b*) the acts of the directors had been sanctioned by a general meeting. That the bill was clearly multifarious, for it asked relief in respect of two separate and distinct transactions against two separate and distinct sets of persons: *Campbell* v. *Mackay* (*c*), *Attorney-General* v. *The Merchant Tailors' Company* (*d*), *Attorney-General* v. *The Goldsmiths' Company* (*e*), *Salvidge* v. *Hyde* (*f*), *Benson* v. *Hadfield* (*g*).

Mr. *Malins* supported the demurrer of the defendant A. S. Wilkinson and of the Portsmouth Company.

Mr. *Turner* and Mr. *Cole*, in support of the bill, contended that the case made by the bill was one in which the Company and the directors were promoting a scheme and taking shares in a Company for a purpose not contemplated or authorised by their Act; that all such cases came within the decisions in *Colman* v. *The Eastern Counties Railway Company* (*a*), *Cohen* v. *Wilkinson* (*b*), *Blakemore* v. *The Glamorganshire Canal Company* (*h*), *Agar* v. *The Regent's Canal Company* (*i*), and *Gray* v. *The Liverpool and Bury Railway Company* (*k*). That, even if the Company legally possessed a number of shares in the Portsmouth line, the directors had no right to increase their venture in it; and this Court would entertain and grant relief even though a bill should be filed by one dissentient shareholder alone: *Bagshawe* v. *The Eastern Union Railway Company* (*l*). They also cited the cases of *Natusch* v.

(*a*) Ante, Vol. 4, p. 513.
(*b*) Ante, Vol. 5, p. 741.
(*c*) 1 My. & Cr. 603.
(*d*) 1 My. & K. 189.
(*e*) 5 Sim. 671.
(*f*) Jac. 151.
(*g*) 5 Beav. 546.
(*h*) 1 My. & K. 164.
(*i*) 1 Swanst. 150.
(*k*) Ante Vol. 4, p. 235.
(*l*) Ante, p. 152.

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Irving (*a*), *Const* v. *Harris*(*b*), *Attorney-General* v. *Cradock*(*c*), and *Taylor's case*(*d*).

Mr. *Roundell Palmer* replied.

The MASTER OF THE ROLLS, after stating the prayer of the bill as hereinbefore set out, proceeded as follows:—The bill, though in a prolix and complicated form, states to the effect, that, in the year 1846, there were five several Railway Companies, known by the respective names of "The London and Croydon Railway Company," "The Croydon and Epsom Railway Company," "The London and Brighton Railway Company," "The Brighton, Lewes, and Hastings Railway Company," and "The Brighton and Chichester Railway Company," and also another Railway Company called "The Direct London and Portsmouth Railway Company." That 2033 shares in the Direct London and Portsmouth Railway Company had become vested in William Arthur Wilkinson, Benjamin Baines, and John Lawrie, in trust for the London and Croydon Railway Company; and by the 9 & 10 Vict. c. cclxxxiii, intituled "An Act to consolidate and unite the London and Brighton and London and Croydon Railway Companies, and the undertakings belonging to them," it was enacted, that the several Companies therein mentioned should be dissolved, and that the several powers vested in them should be given to the Company thereby incorporated; and that the several persons and corporations who, before the passing of the Act, were proprietors of shares in the capital or joint stock of the dissolved Companies, should be united into a Company for the purpose of making, completing, and maintaining the railway roads and works authorised to be made by and for the dissolved Companies under the

(*a*) Gow on Part. App. 404, 4th edit.
(*b*) T. & R. 496.
(*c*) 3 My. & Cr. 85.
(*d*) 1 Swanst. 250.

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authorities vested in them, and for those purposes should be incorporated by the name of the London, Brighton, and South Coast Railway; and the railway and appurtenances belonging to the dissolved Companies, and also all monies, stocks, shares, securities, and books to which the dissolved Companies were entitled, were to become vested in the Company thereby incorporated. And the Act contained various enactments respecting the capital and stock of the Company thereby incorporated and the shares therein.

The plaintiff in this cause was, under the provisions of the Act, entitled to forty-eight shares in the new Company called the London, Brighton, and South Coast Railway Company, and he afterwards purchased 100 other shares therein. It is not disputed by this bill but that, under the provisions of the Act, the 2033 shares in the Portsmouth Company, which were vested in Messrs. Wilkinson, Baines, and Lawrie, in trust for the London and Croydon Railway Company, became the property of the Brighton Company; but it is alleged that the bill for incorporating the Brighton Company contained no power for authorising the Company, directly or indirectly, to subscribe for or purchase any shares in the Portsmouth Company, or to apply their funds or capital for any such purpose; and none of the dissolved Companies had any such powers.

The bill alleges that S. Laing, the chairman, L. Schuster, the deputy-chairman, W. Cash, C. S. Crowley, E. Crowley, G. F. Hotham, J. Lawrie, J. Nix, and J. Whishaw were directors of the Brighton Company; and that the said S. Laing, C. S. Crowley, E. Crowley, G. F. Hotham, J. Lawrie, J. Nix, and L. Schuster were also directors of the Portsmouth Company.

The bill then states, that before the Portsmouth Company could put in force the compulsory powers for taking land for the purpose of their railways, it was necessary that a sum of 1,450,000*l.*, the estimated expense, should

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be subscribed for, but that no more then 1,250,000*l.*, including the 2033 shares or the value of such shares, which had belonged to the London and Croydon Company, had been subscribed for; and consequently, that further subscriptions, to the amount of 200,000*l.* at least, were requisite to be obtained; but it was found impracticable to obtain them in the ordinary way, and that, under such circumstances, the directors of the two Companies concurred in a scheme for supplying the deficient subscriptions, which were wanting by the Portsmouth Company, out of the funds of the Brighton Company, by means of some of the directors subscribing for shares in the Portsmouth Company, in their own names, but, as alleged, as trustees for the Brighton Company; and on the 16th of October, 1846, the directors of the Portsmouth Company passed a resolution, as follows:—"Whereas, previously to notice being given for the purpose of taking land, it is necessary that the signatures to the parliamentary contract should be completed to the extent of the estimated expenses for making the railway, viz. 1,450,000*l.*, it is resolved, that, with a view to complete the subscriptions to the whole amount mentioned in the Act as the estimated sum for defraying the expenses of the undertaking, and which is requisite before any of the powers for the compulsory purchase of land can be enforced, the London, Brighton, and South Coast Railway Company be requested to claim subscriptions to the contract, to the extent of 100,000*l.*, as the agreement between the two parties contemplates that any capital required beyond the sum of 2,250,000*l.* should be provided by the London, Brighton, and South Coast Railway Company." And on the 4th of November, 1846, the directors of the Brighton Company resolved that the shares necessary to complete the capital of the Portsmouth Company be issued to Mr. Schuster, Captain Hotham, and Mr. Crowley; that the deposit be paid to them, and the members of the board be requested to sign the Portsmouth Com-

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pany's deed for the needful amount; and that 2033 shares, standing in the name of Messrs. Wilkinson, Baines, and Lawrie, be transferred to the said trustees after the deed shall be fully signed in respect of such shares; and that, on the 10th of November, 1846, it was resolved by the directors of the Portsmouth Company, that 4000 shares, to represent the capital referred to in the resolution of the 16th of October, should be issued to Leo Schuster, Edward Crowley, and George Frederick Hotham, as trustees for the Brighton Company, agreeably to the resolution of the board of directors of the 4th of November. In pursuance of the agreement made, and of these resolutions, the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham subscribed their names for and procured to be allotted to them 4000 shares in the Portsmouth Company. They executed the deeds relating to the shares, and they and the other directors of the Brighton Company paid out of the monies and funds of that Company the sum of 15,000*l.* for such 4000 shares in the Portsmouth Company, being after the rate of 3*l.* 15*s.* for each share; and further, the 2033 shares formerly standing in the names of Messrs. Wilkinson, Baines, and Lawrie were transferred into the names of Messrs. Schuster, Crowley, and Hotham, in addition to the 4000 shares; and afterwards, with a view to give further assistance to the Portsmouth Company out of the funds of the Brighton Company, the defendants, the directors of the Brighton Company, agreed that such further assistance should be advanced out of the funds of the Brighton Company; and that the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham, or some other of the directors, should subscribe for or purchase certain additional shares in the Portsmouth Company, and that the deposit or purchase-money for such shares should be paid out of the funds of the Brighton Company; and that, accordingly, 677 additional shares in the Portsmouth Company were, in pursu-

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ance of such agreement of the Brighton Company, purchased by Messrs. Schuster, Crowley, and Hotham, or some other of the defendants; and the sum of 2538*l.* 15*s.* was paid as purchase-money, or deposit money, out of the funds of the Brighton Company.

The bill alleges that these transactions were, and were known to be illegal, and that an attempt was made to procure parliamentary sanction for the same, but that the bill brought in for that purpose was thrown out. The bill then proceeds to state, that the Portsmouth Company being unable to complete their whole line, had resolved to abandon the greatest portion of it, and to complete only about four miles of it, viz. that part from Epsom to Leatherhead; and that, for the purpose of enabling them to complete even that part of it, further assistance was required; and that it was agreed between the two Companies, or their directors, that the Brighton Company should out of their funds supply the Portsmouth Company with pecuniary assistance for the purpose, and should accordingly pay them 20,000*l.*, by way of what is called compensation for preliminary and parliamentary expenses; and that an application to the Portsmouth Company should be made to authorise the Brighton Company to purchase the four miles of railway from Epsom to Leatherhead for 50,000*l.*, including the 20,000*l.* which was to be paid in any event; and that, in the mean time, and until parliamentary authority could be obtained, the Brighton Company should work the line intended to be purchased, as if it were their own.

The bill then states at great, and, as it appears to me, at very unnecessary length, the proceedings in this Court in the cause of *Cohen* v. *Wilkinson*, a report made to the meeting of the Portsmouth Company, together with an address or speech of Mr. Wilkinson at a meeting of the Brighton Company, and an explanation or speech of Mr. Laing,—all, I presume, inserted in the bill for the pur-

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pose of shewing negotiations between the Companies for the purpose of completing, or obtaining authority for completing, the purchase by the Brighton Company of the portion of the line not abandoned by the Portsmouth Company, for 50,000*l.*, including the 20,000*l.*, which in one place is called the premium. It then states, that the defendants, the present directors of the Brighton Company, have already paid out of the funds of the Brighton Company some portion of the 20,000*l.*, and intend to pay a further sum to the Portsmouth Company on account thereof.

It was argued for the demurrer, that the relief prayed for by the bill is to be divided into two parts, which are quite distinct,—one in respect of the shares in the Portsmouth Company, purchased out of the funds of the Brighton Company, and the other in respect of the agreement alleged to have been made by the Brighton Company with the Portsmouth Company, for the purchase of their line from Epsom to Leatherhead. It was also argued that, in respect of the 2033 shares in the Portsmouth Company, which became vested in the Brighton Company by the Act of Parliament incorporating them, and which has been called the Amalgamation Act, the Brighton Company became entitled to an interest in the affairs and concerns of the Portsmouth Company; and, for the purpose of protecting that interest, they were entitled to enlarge it if they thought fit, and thereby or otherwise to apply their own funds in promoting the interests of the Portsmouth Company; and it was further suggested, the bill not alleging that the purchased shares were paid for out of capital, but only out of the funds of the Brighton Company, that those funds may have been such as the directors had authority to apply in the manner they did; and it was alleged, that there are in fact various modes in which it might have been done, and in which, on the argument of the demurrer, it ought to be presumed to

have been done, without going beyond the powers of the Act of Parliament.

These arguments were urged with great zeal and ability; but I am of opinion that they cannot be maintained. A Railway Company incorporated by Act of Parliament is bound to apply all the monies and property of the Company for the purposes directed and provided for by the Act of Parliament, and not for any other purpose whatever. When the expenses are paid, and the public purposes directed and provided for by the Act of Parliament, which in truth was the motive and inducement for granting the extraordinary powers given by all these Acts of Parliament,—when these purposes are fully performed, any surplus which may remain after setting apart the sum to answer contingencies, may, if not applied in enlarging, improving, or repairing the works, be divided among the shareholders. The dividends, which belong to the shareholders, and are divisible among them, may be applied by them severally as their own property, but the Company itself, or the directors, or any number of the shareholders assembled at a meeting or otherwise, have no right to dispose of the shares of the general dividend, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of that particular shareholder. Any application of or dealing with the capital, or any part of the capital, or any funds or money of the Company, which may come under the control or management of the directors or governing body of the Company, in any manner not distinctly authorised by the Act of Parliament, is in my opinion an illegal application or dealing; and without meaning to say that it is or could be practicable for individual shareholders to interfere on every occasion, however small, of alleged misapplication of particular sums, I am of opinion that if, as in this case, the directors are proceeding upon an illegal principle, and for purposes not authorised by the Act of

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Parliament, to involve the Company, or the shareholders of the Company, or any of them, in liabilities to which the shareholders, or any of the shareholders, never consented, relief may and ought to be given in this Court; and that the mere circumstance of the Brighton Company having obtained, as it is not disputed they did lawfully obtain, a certain number of shares in the Portsmouth Company, is not a reason why the Company should be enabled or permitted to purchase more shares, and thereby increase the risks to which Parliament permitted the shareholders to be exposed by the shares which may have become vested in them by the Amalgamation Act, or any reason why the directors should be permitted to divert so much of the funds of the Company as they think proper, or indeed any portion of those funds, for the support of another Company having distinct objects, and meant to be applied to purposes different from those in consideration of which alone those powers were granted to them. I am therefore of opinion that the demurrers for want of equity must be overruled.

The demurrers for multifariousness remain to be considered; and, having regard to the mode in which the allegations are stated in the bill, I think that the grounds of complaint are stated as distinct matters. It was argued for the plaintiff, that the agreement for the purchase of the line from Epsom to Leatherhead was but a sequence of the former transaction as to the purchase of shares; but I have sought in vain for any allegation in the bill which in the least degree connects the transactions. I may conjecture (and I think it is rather difficult not to conjecture) that all the transactions are connected and form parts of one design or scheme; but as such scheme is not distinctly stated, and I can only proceed upon that which is distinctly stated, and this, in the great prolixity of the bill, I collect to be, that there was an illegal transaction for the purchase of shares in the Portsmouth Company, and another illegal transaction for the purchase of the railway and other pro-

perty of the same Company. Both the transactions are, as I think, illegal, and for the same reason,—that they alike involve illegal applications of the funds of the Brighton Company; but, although they are alike in this respect, they are not alike either as to the persons affected by them or as to the relief which may be given in respect of them; and unless they are alike in a way which does not appear by the bill, I think relief cannot be given upon the two transactions in one bill. I must, therefore, allow the demurrers for multifariousness, and give leave to the plaintiff to amend his bill.

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Mr. *Turner*.—Then there will be no costs.

The MASTER OF THE ROLLS.—I cannot help hoping, that if you do amend this bill according to the leave, some pains will be taken to abbreviate it. I really am quite concerned to find that bills of this description, necessarily and unavoidably long, should be made unnecessarily so by stating at length proceedings in this Court, proceedings in Parliament, and speeches of directors made at public meetings.

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Where one Company enters into an illegal transaction with another Company, and makes an illegal payment out of their funds in respect of such transaction, a shareholder impeaching the dealings of the Companies, and seeking to have the money restored to the funds of his own Company, is entitled in his own name to maintain a suit against both Companies for that purpose.

A Company is presumed to know the extent of the legal powers of another Company with whom they are dealing, and the Company are proper parties (defendants) to a suit in respect of such dealings, although the bill seeks to make the directors personally liable.

THE plaintiff having amended his bill in accordance with the suggestions of the Master of the Rolls, the Portsmouth Company again demurred for want of equity, and the demurrer now came on for argument.

The plaintiff had amended his bill by striking out all those statements and allegations which related to the al-

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leged agreement for the purchase of a part of the Portsmouth Railway, and the working of that line by the Brighton Company. The bill, when so amended, was against the same parties as were parties to the original bill. It charged that a sum of 24,544*l.* had been paid out of the funds of the Brighton Company to the Portsmouth Company in respect of 4677 shares; and that the last-named Company had received such monies with full notice and knowledge that the same were paid to them illegally and by a breach of trust; and that they concurred and assisted in such breach of trust; and that, under the circumstances, the Portsmouth Company were liable to repay and replace to the funds of the Brighton Company all the sums which had been paid thereout in respect of the said shares.

The bill further charged, that all the proprietors of shares in the Brighton Company had a common interest with the plaintiff in preventing and remedying the illegal acts therein complained of, and in the relief thereby sought; and that such acts were incapable of being lawfully done by the Company, or the directors thereof on behalf of such Company, or of being authorised or sanctioned by the proprietors of shares in the same.

That the number of proprietors of shares in the Brighton Company exceeded 500; and that the rights and liabilities of the said shareholders were so subject to change and fluctuation, by death or otherwise, that it was not possible, without the greatest inconvenience, to make them parties to the suit, and that to do so would, in fact, render it impossible to prosecute the suit to a hearing.

The bill prayed that it might be declared that it was not within the powers of the Brighton Company, or of the directors thereof, to subscribe for or purchase, on behalf and out of the capital or funds of such Company, any of the aforesaid 4677 shares in the Portsmouth Company; and that it might be declared that the defendants,

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L. Schuster, E. Crowley, and G. F. Hotham ought to be taken and considered as having subscribed for and purchased the aforesaid 4677 shares in the Portsmouth Company on their own account, and not as trustees for the Brighton Company; and that it might also be declared that the Portsmouth Company had no valid claim in respect of such shares or any of them, for any call or calls to be made thereon against the capital or funds of the Brighton Company; and that an account might be taken of the sums which had been so illegally paid as aforesaid; and that the defendants, L. Schuster, E. Crowley, and G. F. Hotham, and also the said W. A. Wilkinson, S. Laing, W. Cash, C. S. Crowley, J. Lawrie, J. Nix, and J. Whishaw, might respectively be decreed to replace and repay to the funds of the said Brighton Company the aforesaid sums which had already been paid, and any other sums which might be paid, out of the capital or funds of such Company for or in respect of the aforesaid 4677 shares, with interest at 5*l.* per cent.; and that the Portsmouth Company might also, in like manner, be decreed to repay and replace the aforesaid sums, with interest at the rate aforesaid; and that the defendants, S. Laing, L. Schuster, W. Cash, C. S. Crowley, E. Crowley, G. F. Hotham, J. Lawrie, J. Nix, and J. Whishaw, and also the Brighton Company, might be respectively restrained by injunction from applying any of the capital or funds of the Brighton Company in payment of any further calls on the said shares; and also that the said last-mentioned parties, and the defendants, W. A. Wilkinson and the Portsmouth Company, might pay the costs of the suit.

To this bill the Portsmouth Company demurred for want of equity.

Mr. *Malins* and Mr. *Bovill*, in support of the demurrer, contended, that the present plaintiff had not shewn that

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the injury alleged to have been inflicted by the present transaction was personal to himself, but, on the contrary, that if an injury at all, it was one to which the whole Company were subject. That the money sought to be recovered from the Portsmouth Company was in the nature of a debt to the Company of which the plaintiff was a member. That he had not any right to sue for such debt alone. That the bill contained no allegation that he had required the Company to institute proceedings; or that they had refused to do so; or that he had obtained the consent of the majority of the shareholders present at a meeting convened for that purpose to the course which he was now pursuing. They relied on the case of *Mozley* v. *Alston* (*a*), and the cases therein cited.

Mr. *Turner* and Mr. *Cole*, contrà, contended, that although the defendants, the Portsmouth Company, were a corporation, they had no immunity from being sued beyond that which belonged to any private individual. That, in respect to any illegal application of the funds of the Brighton Company, the Portsmouth Company stood in the position of *participes criminis* with the directors of the Brighton Company, who were doing the illegal act. That, it being admitted that the plaintiff could sue the Brighton Company, there appeared no reason why they could not sue the parties who were assisting them in doing an illegal act, and were, in fact, the recipients of the money which the plaintiff sought to have restored to its proper channel. That the relief sought by the bill merely sought the restoration of the fund, but did not ask for its application or distribution when recovered; and that this suit was merely founded on the ordinary rule, that, in cases of breach of trust, the trust funds may be followed, and the parties into whose hands they had come would be

(*a*) Ante, Vol. 4, p. 636.

proper parties to a suit instituted for the purpose of getting back the fund: *Wilson* v. *Moore* (*a*). That the effect of holding that one shareholder could not institute a suit in his own name to recover money illegally applied would be, to enable the majority of shareholders at any meeting to carry resolutions as against the minority, for the illegal application of any part of their funds, which was clearly against the principle of *Colman* v. *The Eastern Counties Railway Company* (*b*), and *Cohen* v. *Wilkinson* (*c*), and *Bagshawe* v. *The Eastern Union Railway Company* (*d*). That the argument in support of the demurrer would, if it were allowed to prevail, unsettle the rule of equity, that, in respect of an illegal transaction, the right of the minority shall not be dependent on the will of the majority.

Mr. *Malins* replied.

Lord LANGDALE, M. R.—Independently of that point of the right of one shareholder to sue by himself, this case seems to me to be as clear and as plain as anything can be. It amounts, in substance, to this—that the Brighton Company, having in their hands certain monies, which were applicable to one purpose only—to the performance of one particular trust, and no other—and having powers given to them by Act of Parliament in consideration of their engagement to apply these monies for the purposes of their Act, instead of so applying them, pay them to the Portsmouth Company for another and quite different purpose. That is the case of the Brighton Company. On the other hand, the Portsmouth Company had full notice of the only legal purpose for which those monies could be applied, and, having that notice, they nevertheless did avowedly receive the money for the purpose of applying

(*a*) 1 My. & K. 337.
(*b*) Ante, Vol. 4, p. 513.
(*c*) Ante, Vol. 5, p. 741.
(*d*) Ante, p. 152.

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it to the illegal purpose, for which it was expressly paid to them. That is the case of the Portsmouth Company.

Now, whether it is alleged in words or not, it is perfectly clear that both the parties to this transaction are guilty of fraud and collusion. They are guilty of fraud against the legislature, who gave them their powers for purposes entirely different from those which they are exercising; and they are guilty of collusion in together uniting and combining for the purpose of completing that fraud. But it is not necessary to say that they have been guilty of fraud and collusion; it is enough to say that they are parties to the same breach of trust, one in paying and the other in receiving monies for a known illegal purpose; which monies are now, or ought to be, in the hands of the Portsmouth Company. The question before me is, whether the Portsmouth Company ought to be made a party to this suit, which seeks a declaration of rights and the recovery of these monies, which the Portsmouth Company have received with knowledge that they were trust-monies, and which ought to have been applied to a purpose entirely different.

I have not the least doubt that they are properly made parties to this suit. They are not third parties; they have made themselves principal parties to this suit; they have themselves received the monies, knowing the purpose to which they were to be applied. Knowing, therefore, the persons to whom they rightly belonged, they get them out of the hands of the persons who had the management of them, for the purpose of applying them to other and quite different purposes. I think there is no doubt that the Portsmouth Company are proper parties to this suit.

The question next is, whether this plaintiff, by himself, is, under the circumstances, entitled to sue the Portsmouth Company. That he is entitled to sue, and to sue by him-

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self on behalf of other persons against the Brighton Company, has very properly not been denied. There is a right to do that. Well, but if there is a right to do that, is there not also a right, at the same time, to sue the persons who participated in and received the benefit of that illegal act, and who are claiming an interest, which by this bill they are alleged to do, in the maintenance of that illegal act? I must own, that I find it very difficult indeed to yield to the objection in this case. At the same time, if there is a rule laid down applicable to this case, that there is not a right in any individual to sue on behalf of himself and others, when there is an injury done to the whole corporation, without having first made the attempt to get the concurrence of the whole corporation—if there is such a rule laid down, it is not my province or duty to deviate from it; and in that case I should enable these parties to amend their bill if it be necessary.

I do not at present feel persuaded that it is at all necessary to do that; for it is quite manifest, that when the right is in any individual to sue one, there must of necessity, in order that justice may be done, be the right to sue those who are partners in the wrong alleged to be done. Therefore, I could not say on principle that it is necessary. If there is not such a rule, I do not think I ought to lay it down in this case. I rather think that I shall find, when I look at it, that the rule is not so strongly applicable to this case as that I am bound to apply it. It has been alleged on the one side, that it is not applicable—that the rule is laid down in a state of things, and with that sort of relief prayed for, which does not make it proper to apply it to this particular case. On the other side it is said, that the rule laid down by the Vice-Chancellor *Wigram*, in *Foss* v. *Harbottle*, ought to apply; and it is due to the argument that I should look at it. My present opinion is, that it does not apply; but I will look

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at it carefully, and mention it in the course of a day or two, if I find any reason to alter my opinion: if I do not, the demurrer must be overruled.

March 8th.

His Lordship again mentioned the case, and said—I have looked further into that case of *Salomons* v. *Laing*, and I see no reason whatever to alter my opinion. I think the bill may be sustained in this form, though there has been no attempt to get the concurrence of the whole corporation.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE LORDS COMMISSIONERS.

March 26th. July 4th & 15th.

Ex parte ROBERTS, *Re* THE DIRECT EXETER, PLYMOUTH AND DEVONPORT RAILWAY COMPANY.

(*Winding-up Acts*, 1848, 1849.)

A. consented by letter to have his name placed on the list of the provisional committee, subject to his approval of the line, and "so that he should be held free from all liabilities," he attended two meetings; but took no part in the proceedings, and left before any resolution was formally passed or recorded.

IN 1845 a Company was provisionally registered for advancing a project for the formation of The Direct Exeter, Plymouth, and Devonport Railway, and in September of the same year circulars were issued by T. Floud, a solicitor of Exeter, pointing out the advantages of the proposed line, one of which was addressed to Mr. Roberts, and he was thereby requested to allow his name to be placed on the list of the provisional committee of the Company.

To this letter Mr. Roberts replied by a letter of the 22nd September, 1845, which was in these words:—

A few days afterwards, he desired that his name might be struck out of the provisional committee, and that was accordingly done. A. afterwards paid 65*l.* under protest towards the expenses of the concern:—*Held*, that A. was not a contributory within the meaning of the Act.

Held, also, that payment of a sum of money *causâ pacis* and under protest, does not create a liability which would not otherwise exist.

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"Being the owner of a set of mills and lands in the parish of Bradford, near which, I presume, the proposed railway is intended to come, I beg to inform you, in reply to your note, that you may confidently reckon on my support; in proof of which you may, should you think proper, place my name on the provisional committee. Your's,

"E. H. ROBERTS.

"P. S. This must be taken subject to my approval of the plans and course of the line, when definitely fixed upon, and so that I shall be held free from all liabilities."

No answer was sent to this letter, but Mr. Roberts' name was placed on the list of the provisional committee. On the 4th of October following, a meeting of the provisional committee was held, at which twenty-one members were present, including Mr. Roberts; and it was then resolved that another meeting should be held on the 7th, for appointing a managing committee. That meeting was accordingly held, thirty-one members being present, including Mr. Roberts; he took no part in the proceedings at the meeting, and left it before any resolution was formally made or recorded. The only resolution passed at that meeting was, that certain gentlemen who were named should be the committee of management.

On the 13th of October the committee of management entered into a contract with certain engineers, for a survey of the intended line.

On the 20th of October Mr. Roberts desired that his name might be struck out of the list of the provisional committee, and this was accordingly done. No notice of the transactions of the managing committee was sent to Mr. Roberts after his name was struck out, until the 27th of December, 1845, when a circular of that date, in the following terms, was forwarded to him:—

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"Direct Exeter, Plymouth, and Devonport Railway.

"Sir,—I am directed by the committee of management of the Company to request your attendance as one of the members of the provisional committee, at a special meeting to be held at &c., on the 31st instant, to take into consideration the liabilities, and to decide on the best means of settling the claims upon the Company."

Mr. Roberts replied to this circular, expressing his surprise at the notice being forwarded to him, and calling attention to the terms of his letter of the 22nd of September, as to being held free from all liabilities, and to the withdrawal of his name as provisional committee-man on the 20th of October, and also to the fact that he did not attend that or any subsequent meeting until the 2nd of March, 1846, when he was present merely to protest against being considered a member of the committee.

Shortly after the date of his letter Mr. Roberts was threatened with proceedings by creditors of the Company, and under that pressure paid the sum of 65*l.* to the credit of the Company, under protest.

The usual order having been made for winding up the affairs of the Company, the Master placed the name of Mr. Roberts on the list of contributories; whereupon Mr. Roberts moved by way of appeal before Vice-Chancellor *Knight Bruce*, that the Master might be directed to review his decision.

Mr. *Terrell*, in support of the application, relied on the condition contained in the postscript to the letter of the 22nd of September, 1845, and on the fact that this association had never reached the state in which a Company or partnership had been established.

Mr. *Russell* and Mr. *Roxburgh*, for the official manager,

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contended, that the reservation could not release Mr. Roberts from his liability in respect of the expenses incurred, nor as against those who had not received notice of the reservation. The 7 & 8 Vict. c. 100, s. 28, required that any person holding the office of a director or any office of the like nature, should be the holder of at least one share in the capital stock of the Company; and Mr. Roberts, having accepted the office, must necessarily be unconditionally liable in respect of such one share. That, if this defence were allowed to prevail, all the members might be conditionally liable, and there would be no one upon whom the liabilities could attach.

KNIGHT BRUCE, V.C.—With deference to the Master, I do not in this particular case arrive at the conclusion at which he has arrived. Mr. Roberts may or may not be liable to creditors of the Company, creditors of the directors, or creditors of the committee; but that I do not consider the question before me. Again, it is not necessary for me to say what I should have thought of the case if the postscript of the letter of the 22nd of September had not been written; but the postscript was written. Now that postscript I consider an integral and original part of the contract, by which, and under which, Mr. Roberts was associated with the persons with whom he was associated in this matter; and it is in these terms:—"This must be taken subject to my approval of the plans and course of the line, when definitely fixed upon, and so that I shall be held free from all liabilities." I am of opinion that the true construction of these words is, that, as between themselves, as between him and the persons with whom he was to be associated, there was to be no liability on his part. Still, however, he may have stipulated for that ineffectually. The contract, though intended by him to be conditional, may in its effect have been, in law or equity, absolute. That, however, is not my opinion

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here. I think that it was incorporated into the contract from the beginning, and must be considered as having accompanied it throughout. There can be no doubt that cases of possible difficulty might arise; one which has been suggested might arise, viz. the case of every provisional committee-man having joined under a similar reservation as to the absence of liability, and an action brought against all. Then, probably, there must be, by law and in reason, some contribution among them all in respect of that demand, although each had contracted to exclude himself from any liability. No such case as that is, however, brought before me, and the evidence renders it unnecessary for me, I think, to assume that this, (to use a common phrase), is an exceptional case; if it were, it might be necessary to deal with it in a different manner.

With deference to the Master, I think it right, with the materials before me, not to retain this gentleman on the list, carefully confining my determination to the particular circumstances of this individual case, and to this individual case on the materials before me.

Refer it to the Master to review his report, the costs of all parties to be paid out of the estate.

July 4th. A motion was now made by way of appeal, before the Lords Commissioners of the Great Seal, on behalf of the official manager, to discharge the order of the Vice-Chancellor *Knight Bruce*.

The case was argued by the same counsel as in the Court below.

ROLFE, B., Lord Commissioner, after stating the facts as hereinbefore set forth, proceeded as follows:—

In this case, the official manager has moved to discharge the order of his Honor, and to have the name of Mr. Roberts restored to the list; but we think there is not ground for the application to us. The only circumstance found in

this case, and not existing in that which we have just decided (*a*), is, that Mr. Roberts attended two meetings of the provisional committee; but this makes no difference in principle. The question in every case is, not what meetings has a committee-man attended, but what acts has he authorised to be done. Attendance at a meeting proves, perhaps, conclusively, that the party so attending is a member of the body assembled, but it proves no more; if, indeed, any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some circumstances—it may be a very unreasonable one in others; and it is perfectly settled at law, that no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly assent. Now, here, it appears, that, before any resolution was finally come to, Mr. Roberts had left the meeting, and so the resolutions passed certainly were not his acts. Indeed, if he had concurred, all that he would have concurred in would have been in appointing the persons named in that behalf to be the committee of management; and, as was pointed out in the judgment in the Court of Exchequer, in the case of *Wyld* v. *Hopkins* (*b*), it by no means necessarily follows from thence, that the parties appointing the committee of management gave them authority to make contracts. It is not, however, necessary to discuss this, for it is certain, on the evidence before us, that Mr. Roberts did not concur in the resolution by which the committee of management was appointed. We should for these reasons have been of opinion that Mr. Roberts was not a contributory, even independently of the fact, that, in joining the committee, he expressly stipulated that he was to incur no liability. It was urged, that this stipulation was not known to the other

(*a*) See next case. (*b*) Ante, Vol. 4, p. 365.

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members; and if, without such a stipulation, he would, by merely joining the committee, have become liable to the expenses incurred, the argument arising from the non-communication of that fact to the other members might be entitled to weight; but it is certain that Mr. Roberts, when he joined the committee, supposed he had guarded himself against all risk; and this tends strongly to shew the propriety of the view taken by the Courts of law as to the legal position of committee-men. To hold that the mere fact of being a committee-man makes a man responsible for others, would, in effect, be to say that a qualified consent to an application necessarily amounts to, or at all events subjects the party to, the consequences of an absolute one.

It is hardly nesessary to say, that in this case the payment of 65*l.* by Mr. Roberts does not vary the case. That payment was evidently made merely *causâ pacis*, and under protest. It was pressed upon us, that the judgment of his Honor in this case was opposed to that of Lord *Cottenham* in *Besley's case* (*a*). But, on referring to the note of the judgment there, we find that Lord *Cottenham* expressly and studiously founds his opinion on the specialties of the case, and so cannot be taken to have decided the general question.

We are of opinion, on the grounds we have already stated, that the motion in this case must be dismissed, with costs.

(*a*) The case referred to being set down for rehearing before the Lord Chancellor, is not yet reported.

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Vice-Chancellor of England—*April 25th & 27th.*
Lords Commissioners—*June 20th. July 25th.*
House of Lords—*Aug. 5th, 6th, & 9th.*

BEFORE THE VICE-CHANCELLOR OF ENGLAND, THE LORDS COMMISSIONERS OF THE GREAT SEAL, AND THE HOUSE OF LORDS.

NORRIS *v.* COTTLE.

(*Winding-up Acts*, 1848, 1849.)

A person allowing his name to be placed on the list of the provisional committee of a Railway Company in the course of being formed, without more, does not thereby authorise his companions or their officers to pledge his credit with strangers, and he is not a contributory within the meaning of the Acts.

The mere fact of payment of a sum of money by a provisional committee-man, to avoid trouble and contention, is not sufficient of itself to raise either a legal or equitable liability.

IN the year 1845, a project was entered into, for the formation of a railway from Wolverhampton to Birkenhead by the most direct route, and a Company was formed and provisionally registered pursuant to the terms of the 7 & 8 Vict. c. 110, by the name of the Wolverhampton, Chester, and Birkenhead Junction Railway Company. It was proposed that a capital of 1,000,000*l.* should be raised by the creation of 50,000 shares, of 20*l.* each, and that the Company should in the first place consist of 100 members, and seventeen persons were named as the provisional committee.

A prospectus to this effect, and a form of application for shares, were printed by the solicitors of the projected Company, and forwarded to various persons, and among others to Mr. Cottle, with a request that he would allow his name to be placed on the list of the members of the provisional committee.

In answer to this application, Mr. Cottle wrote as follows:—

[" Letter A.]

" Gentlemen,—I have received from Messrs. B. & C. the prospectus of the Wolverhampton and Birkenhead Railway, and I shall have no objection to comply with your request, and will thank you to insert my name and that of my friend, Mr. H."

It did not appear that Mr. Cottle ever attended any meeting of the provisional committee; but at one of such meetings, in October, 1845, it was resolved that each

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member should have the option of holding 100 shares in the Company, and that it should be compulsory upon every member to hold at least 25 shares.

Soon after the passing of this resolution, a letter in the following form was addressed to Mr. Cottle, by the Secretary.

["Letter B.]

"Wolverhampton, Chester, and Birkenhead Junction Railway Company.

"(Provisionally registered pursuant to 7 & 8 Vict. c. 110.)

"Capital 1,000,000*l.*, in 50,000 Shares, of 20*l.* each.—Deposit 2*l.* 2*s.* per Share.

"Sir,—I am directed to inform you, that the committee of management have in compliance with your application allotted to you 25 shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to 52*l.* 10*s.*, must be paid to one of the undernamed bankers, who upon receipt thereof will sign the voucher at the foot of this letter. This letter, with the banker's receipt, must be exchanged for scrip certificates, which will be granted on your executing the subscribers' agreement and parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking."

In the letter the names of the bankers, and the form of receipts on payment of the deposit, were given.

Mr. Cottle returned no answer to this letter, and did not pay the deposit, nor exchange the letter of allotment for scrip certificates, nor did he sign the subscribers' agreement or parliamentary contract.

Plans and sections and books of reference were prepared and deposited in conformity with the Standing Orders of Parliament, at an expense amounting, together with the charges of the agents and others employed, to a sum exceeding 12,000*l.*

The Company abandoned their project about the 5th of January, 1846; and several of the members of the provi-

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sional committee were called upon and did contribute large sums, amounting to 500*l.* each, towards the expense incurred by attempting to carry into effect the objects of the Company; but, notwithstanding such payments, several creditors of the Company commenced actions against the contributors, some of which actions were still pending, when a petition was presented to the Lord Chancellor, for winding up the affairs of the Company, under the provisions of the Joint-stock Companies Winding-up Acts, 1848, 1849.

On the 3rd of November, 1849, the petition was heard by His Honor the Vice-Chancellor of England, and the usual order was made for winding up the Company, and the matter was referred to the Master (Mr. W. Brougham), who appointed H. J. Norris official manager.

On the 22nd of March following, the Master made his certificate, which was in part as follows:—

"That, it having been admitted before me, that, on the 26th of September, 1845, the said J. M. Cottle, by the said letter marked A, allowed his name to be on the provisional committee of the said Company; and that the said J. M. Cottle was advertised as a provisional committee-man, but that he did not apply for or accept any shares in the said Company, and that he attended no meeting, and did no act; and that, by the minute of the 10th of October, 1845, every provisional committee-man was to be entitled to 100 shares, but was to hold 25 shares to qualify him for his office; and that a letter in the form of letter marked B, allotting him 25 shares, was sent to him, but that the said J. M. Cottle never took the said 25 shares, or any share or shares, I have thought fit to exclude, and have excluded the said J. M. Cottle from the said list.

(Signed) "W. BROUGHAM."

The official manager appealed from this certificate of the Master to the Vice-Chancellor of England, praying that

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the decision of the Master might be reversed, and the name of J. M. Cottle placed on the list of contributories.

Mr. *Bethell* and *Mr. Glasse* appeared in support of the motion.

Mr. *Rolt* and Mr. *W. James*, contrà.

The VICE-CHANCELLOR.—I have looked through the Acts of Parliament, and it appears to me that the 11 & 12 Vict. c. 45, would include persons as contributories who really might not have any beneficial interest in the Company. A case might occur in which a person might pay 100*l.* as an indemnity against any expenses that might be incurred; in that way parties might expose themselves to liabilities without having any chance of deriving profit, and might render themselves liable without being members. In the definition of the word "member," in the 3rd section of the Act, it is declared to mean any person entitled to a share of the assets or accruing profits of the Company at the time of presenting the petition for winding up; and the word "contributory" is declared to include every member of a Company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member, or as heir, &c., of a former member, or otherwise howsoever.

Now, in this case Mr. Cottle is admitted to have allowed his name to be placed on the provisional committee, and during that time certain expenses were incurred; and although a resolution was passed by the committee, that each committee-man was obliged to take twenty-five shares before he could be allowed to act, still my opinion is, that, as long as Mr. Cottle allowed his name to be used as a provisional committee-man, he rendered himself liable to the consequence of any act which the committee thought fit to

direct. It does not appear to me necessary, in order to render a person liable as a provisional committee-man, that he himself should have any direct interest in the Company; my opinion therefore is, that Mr. Cottle must, under these circumstances, be considered as a contributory within the meaning of the Act; and that, at any rate, he would come under the last words of the clause, "or otherwise howsoever." If this construction were not to be put upon the Act, it would be palpably defective, and one material class of persons would be omitted. The motion must therefore be allowed, and the Master's decision, expunging the name of Mr. Cottle, must consequently be reversed.

From this decision Mr. Cottle appealed to the Lords Commissioners of the Great Seal, and the appeal came on to be heard before the Lords Commissioners *Langdale* and *Rolfe*.

Mr. *Rolt* and Mr. *W. M. James*, for the appellant.—The cases of *Reynell* v. *Lewis* and *Wyld* v. *Hopkins*(*a*), are conclusive of the present question. They have decided that a man does not, by the mere fact of being a provisional committee-man, render himself liable for anything; he must have pledged his credit, or done some act, or given some orders, to fix himself with any legal responsibility. Even if he attends meetings, it must be shewn that he takes a part in the proceedings, in order to be bound by them. The whole fallacy in the respondent's argument is, that he founds his case on a society, or body of persons to form a Company, being a partnership, which it has never been declared to be at law or in equity. If there is no liability at law, and no partnership in equity, the appellant cannot be held to be a contributory. The Wind-

(*a*) Ante, Vol. 4, p. 351.

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ing-up Acts do not introduce any new law, or any new liability, but leave the law exactly as it stood before the passing of these Acts. [The following cases were also cited in the course of the argument:—*Barker* v. *Stead* (*a*), *Bailey* v. *Macaulay* (*b*), *Wood* v. *The Duke of Argyll* (*c*), *Williams* v. *Piggott* (*d*), and *Ex parte Roberts* (*e*).]

Mr. *Bethell* and Mr. *Glasse* for the respondent, the official manager.—If the interpretation of the word contributory, given in the 3rd section of the 11 & 12 Vict. c. 45, be considered, it must include Mr. Cottle, who has, with his written consent, allowed his name to be placed on the list of the provisional committee. That section says, that contributory "shall include every member of a Company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof." This view of the case is supported by the case of *Barnett* v. *Lambert* (*f*). However, those cases may have been modified by the subsequent cases of *Reynell* v. *Lewis* and *Wyld* v. *Hopkins* (*g*). The appellant in this case consented to act as a provisional committee-man, and in that character to do all acts for promoting and carrying on the scheme, to which he has consented to contribute. The terms of the contract which he undertook to perform are set out in the prospectus, published to the world with the consent of the several persons therein named. The committee of any body of men, acting on behalf of a society, have been held to be individually liable for the necessaries supplied, although they may not actually have given the order: *Flemyng* v. *Hector* (*h*), *Todd* v. *Emly* (*i*). When several

(*a*) 3 Com. B. 946.
(*b*) 19 L. J., Q. B., 73.
(*c*) 6 M. & G. 928.
(*d*) 2 Exch. 204.
(*e*) Ante, p. 310.
(*f*) Ante, Vol. 4, p. 308.
(*g*) Id. 351.
(*h*) 2 M. & W. 172.
(*i*) 8 Id. 505.

persons' names are advertised as the committee acting for a body of persons, and one of them gives orders clearly on behalf of and for the benefit of that body, and for maturing the objects contemplated by that body, it would be against all reasonable justice to say that the person alone who gave the order is liable. It seemed the very object of the Act to give a remedy where justice demanded it, and to compel contributions where all the parties were morally bound to share the losses, as they would participate in the advantages. [The cases of *Ex parte Hollinsworth* (*a*), *Ex parte Cooke* (*b*), *Lefroy* v. *Gore* (*c*), and *Ex parte Morgan* (*d*) were cited.]

Mr. *Rolt* replied.

ROLFE, B.—In this case the Master had excluded the name of Mr. Cottle from the list; but his Honor the Vice-Chancellor of England, on a motion by the official manager, overruled the judgment of the Master, and ordered Mr. Cottle's name to be included among the contributories. The facts of this case were as follows:—By a letter of the 26th of September, 1845, Mr. Cottle agreed to allow his name to be placed on the provisional committee, and it was accordingly inserted in the list, which was advertised in the ordinary mode. Mr. Cottle never attended any meeting, nor applied for any shares, nor, in fact, did anything whatever, except thus giving authority to put his name on the list of the provisional committee. By a minute of the committee, made on the 10th of October, 1845, and entered in the Company's minute book, it was resolved, that every provisional committee-man should be entitled to have 100 shares, but should hold twenty-five

July 15th.

(*a*) Ante, Vol. 5, p. 623.
(*b*) 3 De G. & S. 148.
(*c*) 1 Jo. & Lat. 571.
(*d*) 1 Hall & T. 320; *S. C.*, 1 Mac. & G. 225.

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shares to qualify him for his office. This resolution does not appear to have been made known to Mr. Cottle, except by a letter, dated the 20th of November, 1845, addressed to him by the solicitor and secretary. He was informed that the committee of management had allotted to him twenty-five shares, and directions were given to him as to the payments he was to make, and the steps he was to take, in order to make those shares available. The letter stated the shares to have been allotted to Mr. Cottle in compliance with his application; but no such application had in fact been made, and Mr. Cottle paid no attention whatever to the letter. His Honor the Vice-Chancellor of England, in ordering Mr. Cottle's name to be placed on the list, stated that he founded his judgment on the ground, that, by allowing his name to stand on the provisional committee, Mr. Cottle became liable, *in foro conscientiæ*, to contribute rateably with the other members of that body. And again, his Honor says, that while Mr. Cottle allowed his name to stand on the provisional committee, he might become liable to the consequences of any order that a provisional committee-man might give. We feel compelled to dissent altogether from this view of the law. The cases of *Reynell* v. *Lewis* and *Wyld* v. *Hopkins* (*a*), establish conclusively, that at law, a person, by authorising his name to be placed on the provisional committee, gives no authority to any other member of the committee to enter into any contract whatever. All that a person does by becoming a member of a provisional committee is to signify his approbation of the scheme, and to engage that he will concur with the others in such acts as he may approve of, and may think conducive to the objects in view. If, indeed, he expressly or impliedly gives authority to any one or more of the committee to act for him, then whatever is done in pursuance of that author-

(*a*) Ante, Vol. 4, p. 351.

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ity is of course obligatory on him. In such a case, if goods are purchased, he may be sued by the seller; or, if work is done, he may be sued by the party who has done the work; and if any other committee-man, jointly liable with him, has paid for the goods or for the work, he may be sued by that party for contribution. But the result of the two cases at law to which we have referred—and very many cases have since been decided on the same principle—is, that the mere fact of becoming a member of a provisional committee gives no authority whatever to any one. It was indeed argued before us, that, although a person, by being on a provisional committee, does not make himself liable to third persons for dealings between them and other members of the committee, yet that he does become liable, as between himself and such other members, to contribute rateably in respect of their outlay. But this is an entire fallacy. The obligation to contribute is a legal obligation, and may be enforced by action at law, though often far more conveniently in equity; and the obligation in the case of several persons jointly contracting for their common benefit arises from an implied contract, on the part of every joint contractor, to pay his share of the joint expense. But when once it is established that the mere fact of being on the provisional committee does not make a party to be a joint contractor with those who act and make contracts, the whole substratum fails—there is no joint contract, and so no liability to contribute. On these grounds we feel bound to differ from the Vice-Chancellor of England, and to say that Mr. Cottle did not become liable to contribute to any of the expenses incurred; and the order placing him on the list must therefore be discharged, with costs of the motion before the Vice-Chancellor.

The motion was then brought before the House of Lords by appeal.

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The reasons stated on the appellant's case, for the reversal of the order of the Court below, and that the order of the Vice-Chancellor of England, of the 26th day of April, 1850, should be affirmed, were, first, because the said J. M. Cottle, according to the true construction of the Winding-up Acts, 1848 and 1849, was a contributory of the Company within the true intent and meaning of the said Acts; secondly, because, although the said J. M. Cottle might not be liable to contribute to the payment of all the debts, losses, and liabilities of the said Company, yet that it was manifest that he was liable to contribute to the payment of such of the debts and liabilities of the Company as were occasioned by or in consequence of his request and direction contained in his letter of the 26th of September, 1845; and because, if he was liable to contribute to the payment of any of the debts, liabilities, or losses of the Company, he was a contributory in respect thereof within the intent and meaning of the said Acts, leaving the extent of his liability, and the ultimate amount he might be called upon to pay in respect thereof, to be settled by the Master, under the provisions of those Acts.

The case was argued by the same counsel as in the Court below.

In the course of the reply, Lord *Brougham* observed, that in this case there was no partnership, and it was of no use to put cases of partnership by way of illustration. In answer to this, Mr. *Bethell* contended that it would be easy to suppose cases in which an equitable liability to contribute would attach, although there was no existing partnership—for instance, three persons agreeing in a joint adventure, one to find the ship, another the cargo, and the third the stores, if the adventure fails, the persons who have expended money on account of their share in the scheme would recover contribution from the others.

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Lord BROUGHAM.—My Lords, this case is one of the greatest possible, I may almost say conceivable, importance, and I am only withheld by one consideration from again expressing my anxiety at having the weight of the decision cast substantially upon me, without having the assistance of the learned Judges either of law or of equity. However, I am now about to state the course which I am going to pursue, at the same time seeing the propriety of postponing the decision of the case for some short time.

The course which I propose to your Lordships to pursue is, not to call for the assistance of the learned Judges; and I will state to your Lordships, in one word, why I now think it advantageous to take that course. My Lords, this is the position in which we stand:—If your Lordships were to have the assistance of the learned Judges, of course you must have either the Judges of the Court of Chancery or the common law Judges, or both. There is nothing whatever to require a special Act to enable this House to call for the assistance of the Judges of the Court of Chancery. That is the opinion of Lord *Lyndhurst* and Lord *Cottenham;* and it is very clear, in my mind, that, though collaterally, we have sometimes put it in bills, which have never received the sanction of the legislature, yet it is not essential. Probably it will hereafter, if the new arrangements with respect to the Great Seal and the appellate jurisdiction be made, (which I think excessively difficult, and requiring much consideration to deal with,) be declaratory, and only declaratory. But suppose we really were to have the assistance of the learned Judges of the Court below, how would the matter stand? We have the Master of the Rolls, a late Lord Commissioner; we have the Vice-Chancellor of England, also a Lord Commissioner; and those are two of the Judges whose decisions are, by the appeal before us, in conflict—one has decided one way, and the other has decided the other way. That is not a very satisfactory tribunal to appeal to; they would not form a very satisfactory body of assessors to

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whom to appeal. Then there is the Vice-Chancellor *Knight Bruce*,—for whom I have the greatest possible respect,—a most able, learned, and indefatigable Judge, whose services to the public, and to the suitors in the Court of Chancery, it is impossible, in my opinion, to estimate too highly—especially during the lamented illness of his learned Brother Sir *James Wigram*. He is, to a certain degree, involved in this, because he has decided one of these cases; and the very next case we are to hear is an appeal from himself. He, therefore, becomes no longer so useful a member of the body of assessors to the House as he would have been but for that circumstance. That, therefore, disposes of all the equity Judges, because Vice-Chancellor *Wigram* is, unfortunately, unable to attend; and, indeed, my most learned and excellent friend, the Vice-Chancellor of England, I lament to say, is also, from his continued great indisposition, unable to attend; so that it really amounts to this, that we can have no aid in the case from the learned Judges of the Court of Chancery.

Then, how is it with respect to the Judges of the Courts of common law? They are estopped in much the same way. The Court of Exchequer has varied a little, perhaps more in semblance than in substance; but, at all events, they are supposed to have varied a little in their opinion (*a*). They have decided the three celebrated cases which have been so often commented upon at the bar—one being the leading case against the appellant and on behalf of the respondent; but though they differ, they endeavour to shew, as men do in arguing upon and applying cases,—at one time resisting the application of cases, at another adopting and repudiating them alternately,—that there are no cases supporting a contrary conclusion. There is that Court, including Baron *Rolfe*, one of the Lords Commissioners in question, to whom, therefore, the former observation applies.

(*a*) See post, pp. 331-2.

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Then the Court of Queen's Bench is said to have adopted every tittle of the argument and the statement,—not interlocutorily made in the judgment in Banco of the Court of Exchequer.

Then we have another case (*a*), in which the Court of Common Pleas is also involved; so that, really, taking all these circumstances together, I hardly ever knew a case in which the assistance of the learned Judges, as assessors to this House, would be less fruitful, than in this case now before your Lordships. For which reason I am clearly of opinion that the more useful course for the House to take will be to deal with the case without,—I will not say the incumbrance of that help, but without the embarrassment which undeniably would operate to prevent the assistance of those Judges being so useful and so fruitful as it generally is when points are submitted by the House to them. That is my opinion. And I therefore have no hesitation in advising your Lordships not to call for the assistance of those learned Judges, unless anything shall occur in the course of the argument upon the other cases, to alter the opinion which I now entertain.

Now, my Lords, the remaining question is, how we shall deal with this case. I have only one word to add on that, viz. that I shall beg your Lordships to postpone the final dealing with this case till after the others have been heard. I beg to say that I do that, not altogether on account of its connexion with them, though that is adminicular to the observations I have made and to the resolution to which I ask your Lordships to come, but because my constant course has been, in these long protracted sittings, not to move the judgment of the House till time has been given after the argument, by the intervention of some two or three days, to look into the whole case. That I have done in every case but one,—a case in which there was no doubt whatever. I have, therefore, to propose to your Lordships,

(*a*) *Barker* v. *Stead*, 3 Com. B. 946

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that we should now proceed with the other cases; their connexion with this is an additional ground for that proceeding; and even if that had not been so,—if this had stood alone,—I should not have asked your Lordships to take this into consideration till I had gone further into an examination of the cases cited.

Further consideration postponed.

Aug. 9th. Lord BROUGHAM.—The great importance of this case renders it imperatively the duty of the Supreme Court of Appeal to examine minutely the grounds of the decree under consideration, and to review at large the authorities which bear upon the question, as well as the principles with which it is connected, and which must govern the final decision of this House. The question, and the only question before your Lordships is, whether or not a person, by becoming a member of a provisional committee in a railway or other company not yet completely formed, but in the course of being formed, certainly not yet in active operation, but preparing for such operation, makes himself liable to the other members of the provisional committee, or to any of the officers of the association, in respect of the dealings between those other members or their officers, and third parties, strangers to the association. The respondent's name had been excluded from the list of contributories by the Master, acting under the Vice-Chancellor's winding-up order, by the provisions of the two Acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108. The Vice-Chancellor, however, reversed the order of the Master, and restored the name of the respondent to the list of contributories. That decision was appealed against, and the Lords Commissioners reversed the order of the Vice-Chancellor, and affirmed that of the Master, by which the name of the respondent was excluded from the list of provisional committee-men who were liable to pay contributions. Now, the only question in this case relates to the effect

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of a party being, with his consent, a provisional committee-man; for though during the arguments a good deal was said on the prospectus, yet, first, we have not that document before us, nor had the Master; and, secondly, if we had, however other cases might turn on such prospectus, it clearly would not at all change this case, or alter the position of the respondent in relation to the Company; therefore the question is quite general, and relates to the effect of a person allowing himself to be named as one of the provisional committee in such concern, without more. Now, let us consider, first, what is the legal liability which this allowed nomination imposes; for if it makes the party at all liable to those who contracted with the committee, past all doubt he would be a contributory within the 3rd section of the first-mentioned Act. It appears that considerable discrepancies existed between the decisions of the Court of Exchequer upon this point in the year 1846, and that the Court afterwards changed its view of the matter entirely within a very short time. *Barnett* v. *Lambert* (*a*) was decided in the month of May in that year, and there the Court held the committee-men to be liable. That was the principle upon which the decision had wholly rested; for although it was a fact in the case, that the defendant had attended and acted as a provisional committee-man, no reference whatever was made to that circumstance in the judgment, which proceeded entirely on this—that a person who consented to be a provisional committee-man was assumed to pledge his credit for things necessary to the concern. In November of the same year, the cases of *Reynell* v. *Lewis* and *Wyld* v. *Hopkins* (*b*), were decided in the same Court, and the Judges unanimously held that the committee-man was not liable for the acts of his fellows—the law not implying, from his mere consent to be a provisional committee-man, either an authority from him to make contracts by the committee-

(*a*) Ante, Vol. 4, p. 308. (*b*) Ante, Vol. 4, p. 351.

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men, with other persons, or by the solicitors with the committee, or to the solicitors to make contracts on behalf of the committee, but merely as a promise to act with those others to carry the scheme into effect. The publication of the prospectus with his name was further held to make no difference. In those cases *Barnett* v. *Lambert* was cited for the plaintiff, but it was somewhat remarkable that no reference whatever was made to it in the judgment.

Now, it would have been much more satisfactory had the learned Judges at once admitted that they had erred in deciding the former cases, to which their later decision was wholly opposed. But this silence, carefully kept, was very much more to be commended than a practice sometimes allowed in such cases of erroneous judgments afterwards departed from—I mean the practice of endeavouring to find out special circumstances to distinguish the several cases, for the purpose of making it appear that they are reconcileable. Much bad law has in that way been occasionally introduced, and not soon got rid of, and parties have been encouraged to try points which ought to be regarded as desperate, and other Courts, which have consulted those conflicting cases, are not seldom misled in their search after authorities. No Judge ought to be ashamed, after erring in judgment, to acknowledge his error; still less has a Court any reason for affecting an unseemly reluctance to admit that the dispensers of justice are subject to the common lot of humanity.

The rule laid down by the later decisions of the Court of Exchequer has since been followed by the unanimous concurrence of both the other Courts of common law. The Common Pleas, in *Barker* v. *Stead* (*a*), *Bailey* v. *Haines* (*b*), and in *Wilson* v. *Holden* (*c*), entirely adopted the cases of *Reynell* v. *Lewis* and *Wyld* v. *Hopkins*. Lord *Denman*, too, has said in terms, that there was not a single

(*a*) 3 Com. B. 946; *S. C.*, 11 Jur. 90.

(*b*) 19 L. J. 81.

(*c*) 15 M. & W. 577.

passage in those judgments of the Exchequer from which he dissented. Your Lordships, therefore, have the clear and unhesitating opinion of all the Judges of the common law Courts against the liability at law; and your Lordships have now, consequently, to consider how far that has been held on the other side of Westminster Hall, as either doubtful in a legal point of view, or insufficient to negative the liability of the provisional committee-man in equity and on equitable views. With that purpose your Lordships have been referred to Lord *Cottenham's* decision in *Besley's case*(*a*). But, on a full consideration of what his Lordship said when he gave his judgment, I must deny that he intended either to depart from the doctrine laid down on the other side of the Hall in regard to the legal liability, or to state that the mere fact of consenting to be a provisional committee-man imposed an equitable responsibility. In the course of the argument he certainly evinced a leaning towards that view; but this was early in the discussion; and he prefaces his judgment by stating that the case does not require him to decide whether or not "the mere fact of the defendant remaining on the provisional committee after expenses are necessarily incurred, would, were there nothing more, make him liable to anybody; for," says his Lordship, "the case does not require any observation on that part of it, because there is so much more as to make it unnecessary to consider that." The circumstances on which the decision turns are—his attending meetings when a managing committee is appointed, which reports on expenses incurred; his joining in an order for defraying those expenses; his paying his share towards that expenditure, and his still consenting to allow his name to remain on the committee. His Lordship's view is, that his name was known by him to continue there, that his liabilities thence arose, and that he paid his share acting on that liability;

(*a*) 2 Mac. & G. 187; *S. C.*, 2 Hall & T. 385. This case, being set down for rehearing, is not yet included in these Reports.

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by which his Lordship means to imply an admission, on the provisional committee-man's part, of his liability. It is quite as unnecessary in the present case to consider whether or not his Lordship's view respecting these special circumstances is well founded, as it was for him in that case to consider the consequences of a mere consent to be on the provisional committee, because the circumstances of payment, or of joining in any order by a managing committee, are here wholly wanting.

I may, however, observe that the mere fact of payment, on which the decision of *Besley's case* mainly turns, seems not sufficient of itself to raise either a legal or an equitable liability. A man might submit to pay a certain sum, and refuse to pay more. Such a person might submit for the sake of peace, and also to avoid trouble and contention; or he might even admit that he was properly charged to a certain amount, in consequence of his having concurred in an order respecting a certain small expenditure, while he denied his liability *ultra*, and altogether denied his general liability. But into this it is unnecessary to enter, because the question now before us is relieved from the embarrassment of all such special circumstances.

I have consulted my noble and learned friend, who gave the judgment in *Besley's case*, and I find two things from him distinctly: *first*, that he did not consider that case to be at all inconsistent with the non-liability at law laid down in the Exchequer cases, and subsequently in the Common Pleas and Queen's Bench cases, for that he decided it upon circumstances which did not there occur; and *secondly*, that he utterly dissents, as I do, from the doctrine of the legal liability being no test or measure of the equitable liability, or the general liability on the whole, so to speak. And why do I say this? Because his Lordship expressly says, "Had those special circumstances existed in the cases at law, and had those cases at law decided against the liability at law, I should not so have decided *Besley's case*."

I reckon that to be a most important circumstance, and therefore I felt myself bound to state it openly as the opinion of his Lordship. I have been favoured with his Lordship's own note on this subject. Therefore, no aid whatever is derived from *Besley's case*, in any way in which it may be regarded; to which it is fit I should add, that the case itself is allowed and appointed to be reheard by the Lord Chancellor who has succeeded Lord *Cottenham*. But the appellant contends, that a party joining others in an adventure or other concern may become liable in equity to them, though not liable at law either to them, or to third parties. Here we must distinguish as to the capacity in which such a liability is alleged to be incurred. In the present case there is no partnership. All authority holds that such an association is not a partnership: *Walstab* v. *Spottiswoode* (*a*) and *Reynell* v. *Lewis* (*b*) lay this down in express terms. No such partnership is made between the provisional committee-men and the managing committee, nor is any such connexion seriously contended for in the argument here. They rather put it as an implied authority of principal to agent—as an authority given to contract for the party, and pledge his credit. But if so, there is no question of equitable as distinguished from legal liability; for, if there is any such authority by implication, the principal is bound at law; and the exception so often referred to in the two Exchequer cases, that the provisional committee-man is not liable, unless he has authorised the committee or its servants to pledge his credit, either expressly or impliedly, point to no equitable liability, but to a liability strictly and rigorously legal.

It is difficult, then, to apprehend how the appellant can object to the doctrine laid down in the judgment appealed against, that the legal liability of the party is the measure of his equitable liability. I can see no other

(*a*) Ante, Vol. 4, p. 321. (*b*) Ante, Vol. 4, p. 351.

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measure—I can perceive no other ground of that equitable liability. The proposition is repeatedly urged, that a party may be bound in equity who is not bound in law. No question he may; but then this is a very unfruitful position unless you shew some equitable obligation in the case under consideration, the legal liability being clearly gone by force of the cases decided at law. Much confusion has been imported into the arguments by the reference to contributions as a relief worked out by proceedings in Courts of equity; but the case is this—a right to relief by way of contribution exists at law, but it is so cumbrous and liable to so much difficulty in working it out, and the Courts of law are so entirely incapable of dealing with many matters which are likely to occur in all such cases, that equity is resorted to for convenience. Still, it is not only not easy, it is not possible to figure a case in which equity will decree contribution, unless against one who was legally liable to that which the complaining party has been sued for and has lost. Let us take the case of the old writ of contribution—as by one copartner against his companion, in respect of expense incurred by suit or admission in the Lord's Court; or by tenants in common of a mill which both are bound to repair, and one repairing it when fallen to decay, has his writ against his copartner for his share of the expense. In that case the writ expressly sets forth the common liability, and that because one has done the act, he may sue the other for his proportion to relieve himself (*a*). Neither can it make any difference whether the liability—the common liability—is legal or equitable. If two persons jointly contract to do a thing, and one does it, he may have contribution against the other. Indeed, were one sued in equity for a specific performance, both must be made parties. But then both are liable, and if one does the thing without any suit, he has his relief against the other in respect of both being liable,

(*a*) Fitz. Nat. Brev. 162.

and equally liable. For observe, in this there is a legal liability, inasmuch as each may be sued at law for breach of contract.

The case was ingeniously put of a joint or common adventure, as of a voyage, in which one agreed to find the ship, another the cargo, and a third the stores; and the shipowner recovers for the price of the ship against one. Then, it is said, the others are liable for their share unless each furnishes his quota—the one the stores, the other the cargo. If they are so liable in respect of the price recovered by the shipowner, it can only be because they have made themselves liable to their companions, by an express contract to pay unless they furnished their quota, or by an implied contract to the same effect; and thus they are legally liable for breach of that contract, or they may be compelled in equity to perform it. In no view, therefore, which I have been able to take of this case can I perceive the least ground on which an equity can be raised as between the provisional committee-man and the rest of the committee or their officers, unconnected with and independent of the legal liability of that party, as having either expressly or by implication authorised his companions or their officers to pledge his credit with strangers. The law has been laid down by all the Courts, and it negatives any such authority, express or implied, in a case where no fact exists save only that of a consent to be on the provisional committee. Therefore the respondent, the defendant below, is not a contributory within the Acts, and he ought not to be put on the list by the Master.

The Lords Commissioners have, therefore, accordingly decided rightly in reversing the order of the Vice-Chancellor, and directing the respondent's name to be expunged; and the judgment of your Lordships should be, that that order now appealed against be affirmed, and the appeal be dismissed, with costs.

Appeal dismissed, with costs.

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HOUSE OF LORDS.

HUTTON *v.* UPFILL.

Re THE DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY.

(*Winding-up Acts*, 1848, 1849).

July 24th. Aug. 6th, 7th, & 9th.

A. accepted shares in the character of a member of the provisional committee of a projected Company, but did not pay the deposit thereon. He did not attend any meetings, or in any manner intermeddle with the affairs of the Company:—*Held*, that the fact of being by his own choice a provisional committee-man, concurring with the fact of his acceptance of shares, made him a contributory within the meaning of the Acts.

IN the year 1845, a Company was projected for the purpose of constructing a railway from Birmingham to Oxford, and thence to Reading and Brighton. This Company was duly registered provisionally, on the 5th of August in the same year, and was afterwards, on the 10th of September, again registered, in consequence of a change in its title, as "The Direct Birmingham, Oxford, Reading, and Brighton Railway Company."

A prospectus was printed, published, and circulated amongst the public by the promoters of the Company, setting forth the object and advantages of the Company. From this prospectus it appeared that the capital of the proposed Company was to be 2,000,000*l.* sterling, divided into 80,000 shares, of 25*l.* each, upon each of which shares it was proposed that a deposit of 2*l.* 12*s.* 6*d.* should be paid on the allotment thereof, of which said sum the sum of 2*l.* 10*s.* was intended to meet the deposit required to be made pursuant to the Standing Orders of both Houses of Parliament previously to the introduction of the bill, and the remaining sum of 2*s.* 6*d.* was the sum authorised to be taken for preliminary expenses, pursuant to the Act 7 & 8 Vict. c. 110.

This prospectus contained, among others, the name of the respondent James Upfill, as one of the members of the provisional committee.

The respondent had never signed any written consent to become one of the members of the provisional committee, and never attended any meeting of the provisional committee, nor in any manner interfered with the conduct or management of the affairs of the Company.

The correspondence, on which the judgment is chiefly founded, shewing the manner in which the respondent invested himself with the character of a provisional committee-man, and became an allottee of and accepted shares in that character, is as follows:—

On the 10th of October, 1845, the secretary of the Company sent the respondent a letter of that date, in the words and figures following:—

"Direct Birmingham, Oxford, Reading, and Brighton Railway Company,—46, Moorgate-street.

"Sir,—I am requested to inform you that the committee of management has apportioned 100 shares in this Company to each of the provisional committee. You will please inform me, on or before Wednesday morning next, whether you will take that or any less number. Should you not reply by that time, the committee will consider you decline taking any. I remain, very respectfully, your obedient servant,

"J. B. RAYNER, Secretary."

In reply to this letter the respondent wrote and sent to the said secretary a letter in the words or to the effect following:—

"October 14.

"Dear Sir,—In answer to yours of the 10th instant, I accept the 100 shares allotted me in the Direct Birmingham, Oxford, Reading, and Brighton Railway, and am yours truly, "JAS. UPFILL, P. C.

"R. RAYNER, Esq., 46, Moorgate-street."

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In pursuance of this letter of acceptance the Company made an allotment of 100 shares to the respondent, and thereupon addressed to him the following letter:—

"Letter of Allotment.—Not transferable.

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Capital 2,000,000*l.*, in 80,000 Shares of 25*l.* each.

Deposit, 2*l.* 12*s.* 6*d.*

"No. of Letter, 8. No. of Shares, 100.

"46, Moorgate-street, London, Oct. 18, 1845.

"Sir, The committee of management have allotted to you 100 shares in this undertaking, and I am directed to request that you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 262*l.* 10*s.*, into one of the undermentioned banks, on or before Friday, the 24th of October, 1845, or this allotment will be null and void. This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the office of the Company and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th of October; and notice will be given when the deeds will be sent into the country. I am, Sir, your obedient servant,

"J. B. RAYNER, Secretary.

"To JAS. UPFILL, Esq."

The respondent did not at any time pay the deposit or any part thereof in respect of the shares so allotted to him.

Of the whole number of shares, 67,630 were allotted, but the deposits were paid on 4295 shares only, and the undertaking was consequently abandoned.

The committee of management collectively and individually paid large sums of money on account of debts pro-

perly contracted, and other debts of the Company were then outstanding and unpaid.

On the 21st of December, 1849, an order was made by his Honor the Vice-Chancellor of England for the dissolution and winding up of the affairs of the Company, and the Master to whom the matter was referred appointed Mr. Hutton official manager of the Company, pursuant to the provisions of the statute. On the 24th of July the Master proceeded to settle the list of contributories of the Company, and in such list the respondent was included in his character of member of the provisional committee, as a contributory in respect of 100 shares.

The respondent thereupon applied by motion to his Honor Vice-Chancellor *Knight Bruce*, sitting for his Honor the Vice Chancellor of England, to discharge the order of the Master, and to have his name expunged from the list.

On the 24th of July the Vice-Chancellor *Knight Bruce* made an order reversing the decision of the Master, and directing that Mr. Upfill's name should be struck out of the list, and that the official manager should pay the costs of attending before the Master, and of that application.

From this decision of his Honor Vice-Chancellor *Knight Bruce* the respondent appealed to the House of Lords.

The reasons on which the appeal was founded were the following:—That the Company was formed and constituted so as to come within the operation of the Joint-stock Companies Winding-up Acts. That the respondent, by becoming a member of the provisional committee, became a member of the Company. That the respondent, by accepting 100 shares in the Company, became liable to contribute proportionally towards payment of the debts, liabilities, and losses of the Company, or some part thereof. That the provisional committee, acting as it did in the name of the Company, and assuming that denomination, became and was a company or association within the true intent and meaning of the Joint-stock Companies Winding-up Acts; and that the

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respondent was a contributory of the said Company or association within the true intent and meaning of the last-mentioned statutes.

Mr. *Bethell* and Mr. *Roxburgh*, for the appellant, the official manager, contended, that the letter of the secretary of the Company to the respondent, coupled with the respondent's answer, constituted a complete contract, so that he became at once an allottee of shares in the character of a provisional committee-man; that there had been an unqualified acceptance by the respondent, and although there had been subsequently a condition, the contract was perfect before the condition was imposed, and did not, without more, affect the previous contract. That, although the cases of *Fox* v. *Clifton* (*a*), *Pitchford* v. *Davis* (*b*), and *Wontner* v. *Shairp* (*c*) declare against the liability at law, yet that the liability in equity remained unaffected by those decisions, and the members of the provisional committee must, for the purposes of the Winding-up Acts, be considered to have contracted with one another, and to have incurred *inter se* the rights and liabilities of partners.

Mr. *Rolt* and Mr. *Daniel* for the respondent, contended, that the respondent had never in fact accepted any shares, for that, although the first two letters might, without more, have been considered a contract to take shares, yet that the variation imported into the contract by the last letter and the condition thereto attached, rendered the first contract invalid, and the shares could not be considered to have been allotted by virtue and in pursuance of it: *Duke* v. *Andrews* (*d*). That in fact the allotment had become null and void by the respondent not having complied with the condition, viz. the payment of the deposit, and the consequence was the forfeiture of the shares. That the Company was not in fact formed, since the directors had never

(*a*) 6 Bing. 776.
(*b*) 5 M. & W. 2.
(*c*) Ante, Vol. 4, p. 542.
(*d*) Ante, Vol. 5, p. 496.

allotted the full number of shares, and had failed in raising sufficient capital for carrying out the scheme; and that he had never in any manner pledged his credit or authorised the use of his name in the expenses incurred by the committee of management in endeavouring to form the Company, but to the taking of certain shares in a company when formed. That the Company had never been incorporated by Act of Parliament, or reached that state in which any share of the liabilities could fall on an allottee of shares: *Wontner* v. *Shairp*(*a*), *Bell* v. *Lord Mexborough*(*b*), *Walstab* v. *Spottiswoode*(*c*), *Pitchford* v. *Davis*(*d*), *Williams* v. *Pigott*(*e*).

Mr. *Bethell* replied.

Lord BROUGHAM now moved the judgment of the House. —In this case there is, to a certain extent, a similarity to the one just disposed of. The defendant had allowed his name to be put on the provisional committee, and signed it with the initial letters P. C. in his correspondence with that committee. So far the cases are identical; and were there nothing more, this must have followed the fate of the last case disposed of; but besides his name being put, with his knowledge and consent, on the committee, he was found by the Master to have accepted his shares (meaning of stock and as a provisional committee-man); and upon this ground he was held to be a contributory.

Upon appeal, the Vice-Chancellor *Knight Bruce* reversed the Master's order, and directed the name to be struck out. This order of his Honor is now before us, by appeal, and I must observe, that I have some reason to doubt if the facts were fully before that learned and able Judge. The evidence of acceptance rests on two, or, it is contended by the respondents, three letters. One from the

(*a*) Ante, Vol. 4, p. 542.
(*b*) Ante, Vol. 5, p. 162.
(*c*) Ante, Vol. 4, p. 321.
(*d*) 5 M. & W. 2.
(*e*) Ante, Vol. 5, p. 544.

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secretary, 10th of October, 1845, informs Mr. Upfill that 100 shares in the Company had been apportioned to each provisional committee-man, and asks if he Mr. Upfill is ready to take them;—his answer, 14th of October, says, "I accept the 100 shares allotted to me." Not "apportioned," but "allotted;" and he shews in what capacity he accepted them, by signing with the addition of P. C. to his name, ("as provisional committee-man"). It is contended there was no allotment, but only, by the secretary's letter, an apportionment; this, however, cannot be allowed; for whatever may be the phrase used in the secretary's letter, the answer of Mr. Upfill treats the offer made as an allotment. He says, "I accept the 100 shares allotted me." This, if it stood alone, would import an absolute acceptance; but there follows a third letter, four days later, from the secretary; it is headed, "Letter of Allotment—Not Transferable." It states the allotment of 100 shares, and adds, that a deposit of 2*l.* 12*s.* 6*d.* on each share must be made on or before the 24th of October, otherwise the allotment to be null and void. The letter of allotment was to be presented, and would entitle the party to obtain his scrip on executing the parliamentary contract and subscribers' agreement. It is contended, on the part of the respondents, that the acceptance was not final and complete until the third letter, because no terms had been stated in the first or second letter; but so no terms were indeed stated in the third; the price, the consideration for the shares, is not stated, nor in any way referred to in any of the three letters, except that the shares are said to be 25*l.* shares, which Mr. Upfill must be taken to have clearly known when he became voluntarily a provisional committee-man, and accepted the 100 shares in that character.

Then, it is alleged that the shares were in the third letter said to be "not transferable;" if this made any difference, it is not true, for the letter does not say that

the shares are not transferable, but only that the letter of allotment (as it is called) is not transferable, and which could not be transferred, because the first receiver in this case took his scrip, and paid his deposit, and signed the contract, in his individual capacity as a committee-man, and others received their scrip in other capacities, and their letters were not transferable for the same reason. Then, as to the defeazance on non-paying the deposit, that could make no difference in regard to the rights given before, or in regard to the position in which Mr. Upfill stood between the 14th and the 18th of October. I am therefore of opinion, that the offer and the acceptance in the two first letters constitute a complete and absolute acceptance by Mr. Upfill of his 100 shares, as provisional committee-man, and that he became thereby a shareholder, as far as a person at that time could become a shareholder; that he became clothed and vested with his full right to obtain the situation of a shareholder when that should be more completely conferred on him in the progress of the concern. It is true, that, by the subsequent letter, he is directed to pay the deposit on pain of forfeiture, and that he took no notice of that letter, and did not pay that deposit. Whether this determined his right to scrip and shares or not, it is unnecessary to inquire. He became a shareholder on the 14th—or a person entitled to be a complete shareholder—by his own subsequent act, and which he could become if he chose to do what he was, by the rules of the committee he belonged to, called upon to do.

It is very possible that no profit might result to him during the interval between the two letters of the 14th and 18th, or rather, the day of delivery of that third letter; but if any gain had been made, he would have had his share, and he could not withdraw at his option from the liability which holding this beneficial chance of profit imposed. It is not, as I think, necessary to inquire whether or not this consti-

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tuted a partnership, but it appears to me impossible to avoid the inference, that a person who accepts shares in the joint stock of a concern which he knew was, at least, preparing to carry on operations with the view of gaining profit, must be understood to do an act which entitles him, eventually, at least, to share in the gains, and that he must be taken to give an implied authority to his companions on the committee to pledge his credit, so far as his rateable proportion of the joint stock goes, for the necessary expenses of the committee in preparing to launch the common concern. I hold that this authority, to be presumed from his acts, enures to the effect of making him incur liability in respect of the things done by his companions on the committee, or their officers, and I can find no decision at law to exclude the application of this sound principle to the case. If the Exchequer cases, followed by the other Courts, had laid down another principle—if they had held that the committee-man who had also accepted shares, in no respect authorised the incurring the expenses required for the operation of the committee, in respect of the concern to which those shares appertained —I should then have been obliged to deny that there could have been a legal liability from implied authority; it would have become necessary to consider whether or not the facts did or not amount to a partnership; but I am of opinion, that, independently of partnership, the liability exists.

It may be said that no partnership could be constituted by the acceptance of shares until the Company was formed; and the cases of *Nockells* v. *Crosby*(*a*), and *Fox* v. *Clifton*(*b*), are relied on. Those were cases of subscribers merely, and not of persons who were by their own consent in the management of the concern. The first case, that in the King's Bench, only held that the consideration on which the money had been paid having failed by the

(*a*) 3 B. & C. 814. (*b*) 6 Bing. 776, and 9 Bing. 115.

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Company not being established, the money could be recovered back in an action for money had and received to the plaintiff's use, without deducting for the expense of a secretary's salary, which secretary, as Mr. Justice *Holroyd* observed, had in point of fact never been appointed. The second case, in the Common Pleas, only held that an application for shares, and payment of a first deposit, did not constitute one a partner who had never interfered in the concern.

Neither of these cases resembles the one at bar; neither of them decides, that if several persons join a plan to form a partnership, and one of them accepts a given proportion of the stock, which would give him certain rights were the partnership formed and in active operation, he can recover back money paid by him for necessary expenses in the preliminary and provisional proceedings, or that he must not be held to give an authority, impliedly at least, to pledge his credit for the necessary expenses of the concern whereof he was provisionally a member. I therefore differ with the view taken below, and hold that the order of his Honor the Vice-Chancellor should be reversed, and Mr. Upfill's name restored to the list of contributories. I entirely agree with Lord *Cottenham's* first observation, in giving the judgment in *Besley's case* (*a*), when he says, "I cannot for a moment entertain the idea that this Company had not advanced to that state which made it the proper subject of an order under the Winding-up Act;" it may be quite right to draw within the operation of the Act concerns which require the aid of the Act, whether you call them Companies or associations—by whatever names they now go is immaterial—because it is only the fact that it has become an association or a Company within the meaning of the Winding-up Act, which could give the Company the power to wind up their concerns.

(*a*) 2 Mac. & G. 187; *S. C.*, 2 Hall & T. 385. This case is down for rehearing, and therefore is not yet included in these Reports.

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It has been held by common law Judges, that the circumstances on which we have been proceeding were for a jury, but we are, in Courts of equity, both Judge and jury; and, as for sending issues to be tried, nothing could be more absurd. The verdicts could not be obtained, and the whole object of the Acts would be defeated.

Mr. *Rolt*.—I do not know whether your Lordship's judgment goes to the number of the shares.

Lord BROUGHAM.—My judgment is founded on both circumstances; it is not that every shareholder is liable, but that the provisional committee-man, who also receives the shares due to him in his capacity as provisional committee-man, gives an implied authority; and I most distinctly must guard this, as I have twice stated in my judgment. It is most distinctly to be considered as not deciding the point, whether any person applying for shares, or receiving shares, would be so liable. For aught I know, *Nockells* v. *Crosby* might be material in that case.

Mr. *Rolt*.—I mean, my Lord, as to the exact number of shares as found by the Master being 100; that number is got at by the resolution which apportioned 100 to the provisional committee-men.

Lord BROUGHAM.—No, that 100 is got at by his own acceptance. I do not think that point was brought distinctly before us.

Mr. *Rolt*.—No my Lord, there was no discussion upon it

Lord BROUGHAM.—I wish it to be distinctly understood, as this is of the greatest importance, that it is upon the two facts taken together that the judgment proceeds: one of them is found at law not to be sufficient without the

second; and it is a question whether the second is sufficient without the first; however, the decision of the House goes on both points concurring, viz. the fact of the party being a provisional committee-man by his own choice, plus his acceptance of shares.

I ought to mention that I have communicated with my noble and learned friend Lord *Cottenham* on this subject, and he takes exactly the same view that I do; but that would probably have less authority on this account, that Lord *Cottenham* has a strong leaning upon the subject of liability, and he leans much more in favour of it than other Judges have been disposed to do, though he clearly negatives the doctrine ventilated at the bar here, rather than distinctly maintained, viz. that there was an equitable liability, though not a legal liability, and that the legal liability is no share of the equitable or general liability. To what amount the respondent shall in the present case be held liable is not material; if liable at all, he is a contributory; and the question brought here by the appeal, and the question before the Vice-Chancellor, was, whether Mr. Upfill was a contributory or not; if he was, the Master was bound to insert his name: but also, he was bound to insert his name, as he did, in respect of 100 shares. To what this made him liable we have no business to consider.

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COURT OF CHANCERY.

BEFORE VICE-CHANCELLOR ROLFE.

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Nov. 7th & 14th.

(*Winding-up Acts*, 1848, 1849).

Where the number of subscribers to a scheme for forming a Company proves insufficient to raise the necessary capital, and the project turns out to be impracticable:—*Held*, that an allottee of shares is not a contributory within the Acts.

THIS was a motion by Messrs. Maudslay, Sons, & Field, engineers, to discharge the certificate of the Master, whereby he had declared them to be and had placed them on the list of contributories of the Indian and Australian Mail Steam Packet Company, and that it might be referred back to the Master to review his certificate.

The facts were as follow:—

On the 6th of August, 1847, a charter for forming a Company for the purpose of establishing a line of steam vessels between England and India, with an extension to Sydney, passed the Great Seal, which, after reciting that the capital of the proposed Company was to be 1,000,000*l*, to be divided into 50,000 shares, of 20*l*. each, and that the persons therein named, with such and so many other persons as had become, or from time to time thereafter should become members of the Company so to be formed, should be a body corporate, by the name of The Indian and Australian Mail Steam Packet Company, for the purposes thereinafter mentioned. And it was directed, that the said persons therein named, and all other the members for the time being of the said Company, should, within one year from the date of the charter, execute a deed of settlement. And it was further directed, that the said Company should not commence business until the said deed should have been approved of as therein mentioned. And it should have been certified to the President of the Board of Trade,

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by at least three of the directors of the Company, that at least one-fourth of the capital had been subscribed for, and at least one-eighth paid up.

On the 10th of August, 1847, Messrs. Maudslay, Sons, & Field, engineers, made the following application to the committee of the Company for shares, by filling in a printed form which had been forwarded to them with the prospectus:—"We request that you will allot us 1000 shares of 20*l.* each in the above undertaking, upon which we engage to pay the preliminary deposit of 5*s.* per share; and we engage to accept the same, or any less number that may be allotted to us, and to sign the deed of settlement when required." And this application was accompanied by a letter to the secretary, in the following words:—

"Sir,—We beg to hand you herewith an engagement to take 1000 shares. Referring to the conversation Mr. Field had with you some days since, and also to the explanation you gave our chief clerk, Mr. F., on Saturday, relative to the arrangement that would be made with us in the event of our taking an interest in the proposed Company, we beg to hand you herewith an engagement to take 1000 shares; and, in the event of your maturing your plans with the Government, we take it for granted that your directors will carry out the views you expressed to Mr. F., to the effect that we shall receive a due share of your orders, and also be at liberty to reduce the number of shares now subscribed for."

In answer to this application, the secretary of the Company wrote that 1000 shares had been allotted to Messrs. Maudslay & Co., on the terms of their letter; and the deposit of 5*s.* per share on that number was duly paid by them to the Company.

Other correspondence passed between Messrs. Maudslay & Co. and the secretary, relative to the commencement of

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the business of the Company; and, at a meeting of the directors of the Company, it was resolved that the directors should be authorised to appoint Messrs. Maudslay & Co. and two other firms to be engineers to the Company, on each of the said firms subscribing for and agreeing to hold 500 shares at least in the capital stock of the Company, paying the first instalment of 1*l.* per share, and subscribing the deed of settlement.

A greater number of shares than that required by the charter was applied for, but the one-eighth of the capital thereby required to be paid before beginning business, was not paid up, the deed of settlement being only signed by twenty persons. Messrs. Maudslay & Co. did not subscribe the deed.

A negotiation was afterwards entered into with the Government on behalf of the projected Company, in order to obtain a contract for the conveyance of the mails; but the Company being unable to shew that they were sufficiently prepared to undertake the contract, the negotiation failed; and in January, 1849, at a meeting of the shareholders, it was resolved that the existing liabilities of the Company should be paid, and the affairs wound up; and an order was made for that purpose on the 4th of May, 1849, under the Winding-up Acts.

Mr. *Bethell* and Mr. *Daniel* appeared in support of the motion, and contended, that, in this case, the so-called Company had not in fact ever reached the state in which any expenses on behalf of the Company ought to have been incurred. There was, indeed, a charter which might have the effect of making it at some time or other a Company, on its fulfilling certain conditions; and it was of such a Company that Messrs. Maudslay & Field consented to become partners; but they never subscribed their money except on the understanding that such a Company was to be formed; they did not subscribe to the undertaking or pro-

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ject for forming a Company, but to the Company when formed. The case of *Hutton* v. *Upfill* (*a*), in the House of Lords, had decided this: that a person, in order to come within the class of contributories, must fill the position of provisional committee-man, and have accepted shares; and it was there decided, that either position alone was not sufficient, but that the two characters of provisional committee-man and allottee must be combined. Here it was not pretended that Messrs. Maudslay were members of the provisional committee; and, on the authority of that case, the Master had erred in placing them on the list of contributories. *Cottle's case* (*b*) had in fact decided the present one.

Mr. *Rolt* and Mr. *Hetherington*, in support of the Master's finding, contended, that the registration of the Company, and the definition of the word in the Winding-up Acts, clearly shewed that a body of persons, constituted as the present, was in effect a Company, and that all the persons forming the body were jointly liable for the debts and for the expenses incurred in bringing it to a state to carry on business. The present appellants were in fact subscribers to and members of a partnership, and persons had supplied goods and given credit to the concern on the faith of the deposits being applicable to the payment of their debts. The managing directors were the persons authorised by the subscribing members to act on their behalf, and it would be most unjust to make them liable to all the losses of the concern, when, if it succeeded, they would only reap an equal share of benefit with the other shareholders. The very fact of the allottees of shares not paying up their deposits had been the cause of the scheme not being matured, and all the expenses which had been incurred by the directors

(*a*) Ante, p. 338. (*b*) Ante, p. 316.

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on the faith of the acceptance of the shares in the concern, and the payment of the deposits, would be money thrown away, in consequence of the breach of performance of their contract by the subscribers. Was it not most unjust that those who had caused the failure of the scheme should be free from any contribution or loss occasioned by their own want of faith with the directors? The whole object of the Winding-up Acts was, to give a remedy in cases where parties had in fact entered into engagements which ought and might possibly be declared in equity to be partnerships; and it had given this remedy, because it was almost hopeless to obtain in such cases relief in the Court of Chancery, on account of the number of parties and varied interests which must necessarily be represented in a suit.

Mr. *Bethell* replied.

His Honor reserved his judgment.

Nov. 14*th.* VICE-CHANCELLOR ROLFE.—This was an application under the Winding-up Acts, to strike out from the list of contributories, as settled by the Master, the names of Messrs. Maudslay & Field. The promoters of the scheme obtained a royal charter, dated the 6th of August, 1847, incorporating the Company; but, by the provisions of the charter, the Company was prohibited from commencing business till one-fourth of the capital should have been subscribed for, and one-eighth should have been paid up. The capital was to be 1,000,000*l.*, divided into 50,000 shares of 20*l.* each. Before, therefore, the concern could come into operation, it was necessary that 250,000*l.* should have been subscribed for, and 125,000*l.* should have been actually paid up. These conditions were never complied with, and the Company, therefore, never came into existence as a working concern. The project having proved impracticable, the usual order was made, on the 4th of May, 1849, for winding up

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the affairs of the Company, and, in settling the list of contributories, the Master has included among them the names of Messrs. Maudslay & Field; and the ground on which he has held them liable is, that they agreed to take either 1000 or 500 shares (the number is not material) in the chartered Company, and paid the required deposit of *5s.* per share on the larger number of 1000.

Now, it is to be observed, that in this, as indeed in a large proportion of the cases, the concerns really wound up, though described as the concerns of the Company, are in truth not the concerns of the Company, but the concerns of a body of persons who have incurred expenses in endeavouring unsuccessfully to form a Company. It would be idle pedantry even to advert to this distinction, if it were merely an inaccuracy of expression; but it is very necessary to keep it carefully in view when we are considering by whom the liabilities of the concern are to be borne; for it by no means follows that the same persons who would have been bound to bear the losses of the projected concern, if it had been formed, are liable to pay or contribute to the costs incurred in the abortive attempts to form it. The question we have to decide, in determining whether a party is to be treated as a contributory to the expenses incurred in endeavouring to form a Company, must be, whether such party authorised the person by whom they were incurred to incur them on his account. If he did, then he is liable to contribute; if he did not, then he is not liable. It has indeed sometimes been said, that, though this may be the test of the legal, it is not necessarily the test of the equitable liability. To this I must remark, that I have never known in any of these cases an equitable as distinguished from a legal liability. I will not, however, say that such a case may not exist. Should it occur, it must be dealt with on its own grounds. Suffice it to say, that, in the case now before us, and in all similar cases where persons are to be made liable to the preliminary expenses by reason of their

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dealings with the promoters of the scheme, the liability, if it exist, is certainly legal and not equitable.

Now, applying these principles to the case of Messrs. Maudslay & Field, we must inquire whether they gave authority to Mr. Yates, and the other persons active in trying to form the Company, to incur expenses on their account. If they did so, it could only have been by their paying the deposit thereon of 5*s.* per share. But how did this give any such authority? Taking or agreeing to take shares in a Company, when translated into legal language, means only agreeing to become a partner in the concern which is about to be formed. A man may well agree to this, if, having considered the nature of the scheme and capital to be raised, he is satisfied, that, with the proposed funds and number of contributors, the speculation is likely to be profitable. Whether the promoters will be able to get the requisite capital, or the necessary body of subscribers, or what may be the cost of doing so, is a matter as to which he has no means of judging, and with which his contract to become a member of the Company when formed, has no necessary connexion. It is, indeed, often made matter of stipulation in these cases, that the expenses of forming the Company,—"preliminary expenses" as they are called,—shall be a first charge on the funds of the concern when formed. But that does not vary the case. A party taking shares with such a stipulation agrees, indeed, that, when the conditions of forming the Company have been performed, its funds, to which he agreed to contribute, shall be liable to the preliminary expenses; but still the formation of the Company is a condition precedent, and until that has been performed he is liable to nothing—I say to nothing; but that, perhaps, requires to be qualified, for it is often made a term, express or implied, that the small original deposit made on applying for shares shall be applied to the payment of the preliminary expenses; and when that is the case, and the money has been so applied,

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the sum so deposited cannot of course be recovered back by the depositor, even though no Company should be eventually formed. But this depends on a special contract, and certainly does not make the depositor further liable.

Now, applying these principles to the case before me, I am clearly of opinion that the names of Messrs. Maudslay & Field have been improperly placed on the list. I assume that they applied for and conclusively agreed to take 1000 shares in this concern; but, for the reasons I have already stated, I do not think this involved them in any part of the expenses incurred in the endeavour to form the Company, or gave any authority to the promoters to incur expenses on their account. Whether they may have precluded themselves from recovering back the 5*s.* per share deposit is a matter on which it is not necessary that I should give an opinion. The right of these parties to be removed from the list of contributories appeared to me at the time of the argument so clear, that I should not have reserved my judgment, had it not been urged at the bar, that the decision of the House of Lords in *Upfill's case*, at the close of the last session, was a decisive authority for retaining the names. I was anxious, therefore, to look into that case, and I have since done so, and find it clearly distinguishable from the present case. There Upfill was a provisional committee-man, and in that character he accepted shares. Lord *Brougham* expressly stated, in giving his judgment, that he decided that case, not on the ground that Upfill was a provisional committee-man—not on the ground that he had accepted shares,—but on those two facts taken in union with each other. I presume the principle of that decision is, that when a provisional committee-man accepts shares in that character, he must thereby be taken to have given opportunities to the other members of the provisional committee to incur expenses on his account in forming the Company. I confess that I have great difficulty in understanding the principle; but of course I bow

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to the authority, and shall be guided by it in cases where the facts are similar. Here, however, there is a clear distinction, for Messrs. Maudslay & Field were not provisional committee-men, and took no part in forming the Company, except so far as they may be considered to have done so by agreeing to take shares; so that one of the ingredients, held by Lord *Brougham* in *Upfill's case* as essential in order to create liability, is wanting. I have decided this case on general grounds, which makes it unnecessary for me to inquire how far Mr. *Bethell* is right in his argument, that, in fact, there never was any acceptance of shares at all, or, if there was, then that such acceptance was afterwards abandoned by consent. The names of Messrs. Maudslay & Field must be removed from the list, and the costs of all parties will come out of the funds.

BEFORE THE VICE-CHANCELLOR OF ENGLAND AND THE LORD CHANCELLOR.

Jan. 19*th*, 21*st*, & 22*nd*. *Feb.* 7*th* & 8*th*. *June*.

HEATHCOTE *v.* THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

Although a Court of equity has jurisdiction, in a proper case, to prevent an application to Parliament for a private Act, or an Act respecting property, it will not interfere on the ground that such an application, if successful, would interfere with pre-existing rights, whether such rights exist by tenure of property or by virtue of contract.

A Railway Company applied to Parliament for an Act to form their line, and their application was opposed by a landowner through whose land the line would pass. He afterwards withdrew his opposition on the faith of an agreement which provided for the formation of a branch line to his iron-works. The Company obtained an Act for this purpose, but afterwards determined to abandon their intention of making the branch railway, and were about to apply to Parliament for an Act to enable them to do so; when the plaintiff filed his bill for an injunction. The Vice-Chancellor of England granted the injunction, but the Lord Chancellor, on appeal, reversed his decision and dissolved the injunction.

Held, that a contract to make a railway is not one of which a Court of equity will compel the specific performance, but will leave the parties to their legal remedies.

THIS was a motion in an original and supplemental suit, instituted by the owner in fee of certain lands and smelt-

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ing furnaces situate at Apedale, in the county of Stafford, who was also the owner, in manner hereinafter mentioned, of a canal called the Gresley Canal, and coal and other ironstone mines, near or through which the Silverdale Branch of the North Staffordshire Railway Company (Pottery Line), 1846, was intended to pass.

At the time when the bill for the last-mentioned line was before Parliament, the plaintiff opposed it in committee; but a treaty or negotiation was entered into between him and the chairman of the proposed line, which resulted in the following heads of agreement:—*First*, that the Company should apply for a bill in the then ensuing session of Parliament to construct a railroad from Newcastle to the plaintiff's furnaces at Apedale. *Secondly*, that the railroad should be constructed at the expense of the Company. *Thirdly*, that, in the event of any obstruction being made on the plaintiff's canal during the progress of the works, the Company should provide means for carrying on his traffic at their own expense. The plaintiff agreeing, *first*, that the canal should be placed at the disposition of the Company, in order to convert it into the said railway. *Secondly*, that, in case the Company should deem it advisable to construct the railway without making use of the canal, so much of the canal as extended from the east side of the works at Apedale to the wharf at Newcastle should be given up to the Company, without charge, within one week after the opening of the railway.

These heads of agreement were afterwards embodied in an indenture dated the 10th of October, 1846, made between the Company of the one part, and the plaintiff of the other part, which also contained a covenant by the plaintiff, that he would aid and assist the Company in obtaining an Act for making the branch line to Apedale, and by all means influence, forward, and promote the undertaking; and, in consideration of the expense and outlay to which the Company would be put in the formation of the branch

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railway, the plaintiff undertook to convey to the Company so much of the bed and site of the canal, and the towing paths thereof, as was marked on a plan thereto annexed. And the Company covenanted, that, in the following session, if the application in the ensuing session should be unsuccessful, they would at their own expense obtain a distinct and separate Act of Parliament, empowering and requiring them to make a branch railway, commencing by a junction with the Company's Silverdale Branch from the North Staffordshire Railway (Pottery Line), and terminating at or near to the furnaces at Apedale, and open the railway for use, and ever after maintain the same; and it was mutually agreed, that if any dispute or difference should arise between the parties to the said indenture, respecting the meaning thereof, the same should be referred to and settled by arbitration, in the manner provided by the Railway Clauses Consolidation Act, 1845.

In pursuance of the provisions of the agreement, the Company applied for and obtained an Act empowering and requiring the Company to make and construct the Apedale Branch Railway, to commence with a junction with the Silverdale Branch Railway, and to terminate at or near to the Apedale Iron Works. The Apedale Branch Railway, as authorised by the last Act, diverged from the Silverdale Branch Railway at a considerable distance beyond the Gresley Canal, so that the Company were precluded from using any part of the bed of the canal as the site of the Apedale Branch Railway.

The bill stated, that the Company had then only lately taken any steps towards making the Silverdale branch line, and had determined not to make the Apedale branch at all, and in fact had only made a small portion of the Silverdale branch; and that the making the Apedale line was of very great importance to the plaintiff.

The Company afterwards gave the plaintiff notice, in accordance with the provisions of the Lands Clauses Con-

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solidation Act, to treat for the purchase of a small piece of land and a part of the Gresley Canal, comprised in the original agreement, which was required by them for the Silverdale Branch Line. A lengthened correspondence then took place between the solicitors of the parties, in which the solicitors of the plaintiff protested against any proceedings under the Lands Clauses Consolidation Act, as being in breach of the agreement. The Company afterwards proceeded under the 85th section of the Lands Clauses Consolidation Act, and on the 25th of June, 1849, entered into possession of the piece of land, and of that portion of the canal comprised in their previous notice.

The Company alleged, that the plaintiff was unable to make a good title to the Gresley Canal, inasmuch as, if it ceased to be a canal, the land would revert to the original owners, under the Act of Parliament, and that the plaintiff had forfeited and lost all right and title to have the stipulations of the agreement performed.

The bill charged, that the plaintiff was absolute owner of the canal, and that his title was well known to the Company at the time they entered into the agreement with him; and that, in the event which had happened, of the Company not requiring the bed of the canal, the clause of reverter would not come into operation, and the plaintiff could give a good title. The bill further charged that the powers of the Company for the compulsory purchase of lands expired on the 26th of June, 1849; and that, at the time when the Company served the notice under the Lands Clauses Consolidation Act, it was impossible for them to complete the purchase, or even to ascertain the compensation to be paid for the land taken under their compulsory powers within the time limited for that purpose.

The original bill prayed that it might be declared that no part of the hereditaments and premises of plaintiff, comprised in the indenture of the 10th October, 1846, was, after the execution of that indenture, subject to be taken or pur-

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chased by the Company, under the compulsory powers contained in the Lands Clauses Consolidation Act, 1845; and that all powers of the Company, under the Lands Clauses Consolidation Act, 1845, for the compulsory purchase of lands and hereditaments required for the Silverdale branch, expired on the 26th of June, 1849, and therefore ceased, and were not exerciseable; and that the aforesaid proceedings of the Company, under colour of the 85th sect. of the Lands Clauses Consolidation Act, 1845, were or had become irregular and of no effect; and that the Company might be decreed specifically to perform the agreement on their part, contained in the said indenture of 10th October, 1846, and with all practicable expedition to complete and open for use the Apedale Branch Railway, and also the Silverdale Branch Railway, to the full extent authorised by their Acts or either of them, plaintiff being ready and willing to perform the agreement contained in the said indenture on his part, and to convey and assure according to the provisions of said indenture to the Company, their successors and assigns, at their expense, so much of the canal, with the appurtenances thereto belonging, as was comprised in the said indenture, and to treat with the Company for any other property of plaintiff which might be required by the Company for the bonâ fide purpose of constructing the Apedale Branch Railway, or the Silverdale Branch Railway, to the full extent; and that the said Company, their secretary, agents, and servants, might in the mean time be restrained by the order and injunction of the Court from issuing any warrant to the sheriff of the county of Stafford, requiring him to summon a jury for the purpose of determining the amount of compensation to be paid to plaintiff for the purchase of the hereditaments and premises comprised in the notice of the Company; and from exercising any other power, or doing any act for the purpose of compulsorily taking possession of the said hereditaments and premises, or purchasing or acquiring any interest in

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the same, and from entering upon, or continuing in possession of the said hereditaments and premises, or any part thereof; and from digging or excavating, or doing or executing any railway or other work in or upon the same, or any part thereof, and from obstructing or in any way interfering with the navigation of the said canal, or with the free use and enjoyment thereof by plaintiff, his executors, administrators, or assigns.

The defendants put in an answer to the original bill, to which the plaintiff excepted for insufficiency; but before any further answer had been put in, the plaintiff filed a supplemental bill, stating, that, since the filing of the original bill, the Company had determined, and they intended, to apply to Parliament, at the then next ensuing session of Parliament, for an Act to authorise the Company to abandon the formation of the Silverdale and Apedale Branch Railways, and had advertised such their intention, and given notice to the landowners on the proposed line of railway.

The supplemental bill prayed, that the Company might be restrained from presenting any petition, and from making or presenting any application to Parliament for obtaining an Act to authorise them to abandon or relinquish the Silverdale and Apedale Branch Railways, or either of them, or to authorise anything whatever to be done, or omitted to be done, by the Company, inconsistent with or repugnant to the covenant on the part of the Company, contained in the indenture of the 10th of October, 1846, and from giving any notice or taking any proceeding required by the Standing Orders of either House of Parliament, to warrant an introduction into or the progress through Parliament of any such Act.

The plaintiff now moved for an injunction in the terms of the prayer of the supplemental bill.

Mr. *Rolt* and Mr. *Amphlett*, in support of the motion.

Mr. *Bethell* and Mr. *Bovill*, contrà.

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Jan. 22nd.

The VICE-CHANCELLOR, (without hearing a reply).—It appears to me that the plaintiff is only asking to restrain the Company from doing that which is expressly contrary to what I may call a performable part of the agreement of October, 1846, and I see no reason why the Court should not interfere. This is the only part which appears to me at all material. There is an incongruity in granting the injunction as prayed by the original bill, and that contained in the supplemental bill and notice of motion; but if the two are kept separate, although it may be true that the Court cannot interfere to compel performance of that which the Company undertook to do, still it may interfere to restrain the Company from doing that which is contrary to the agreement; and that appears to me the right course to pursue. I shall therefore grant the injunction according to the terms of the notice of motion.

Feb. 7th. The Company now moved to dissolve the injunction before the Lord Chancellor.

Mr. *Bethell*, Mr. *Malins*, and Mr. *Bovill*, on behalf of the Company, contended, that the injunction granted by the Vice-Chancellor ought to be dissolved, on the ground that the plaintiff was unable to fulfil his part of the agreement, because he was unable to give the Company a title to the canal, which was an integral part of the agreement. The agreement to make the Apedale Branch Railway was dependent on the making the Silverdale branch, for it would be useless to the Company to make the former line without the latter, into which it was to run. That the time for making the Silverdale branch had expired, and it was necessary to apply to Parliament to abandon it, because the payment of dividends on the rest of the line was restricted to the completion of the branch railway to Apedale. That the plaintiff would not be prejudiced by the Act, as it was

only a permissive Act, and would not alter the position in which he stood under the agreement. That the plaintiff had invalidated the agreement by the statement that he was owner in fee, when he was in fact only tenant so long as the canal remained in its present state, but if the canal were dried up, the land would revert to the original owners. That the plaintiff's canal was in fact a feeder to the Newcastle Canal, and made auxiliary to it by Act of Parliament; and that the present plaintiff could not in any manner interfere with the present disposition of it. The plaintiff could have no relief at the hearing, and was not now entitled to his injunction: *Duke of Beaufort* v. *Neeld* (*a*). That this agreement was not one of which the Court could compel specific performance; in all cases where the Court interferes, the effect must be immediate and complete, and perfected by one or more acts; neither was it a case in which the Court would interfere to set the machinery of the Act in motion, for it must then be one in which the order of the Court would have the effect of a mandamus; but in this case a mandamus could never be enforced, for no return could be made to it: *Dietrichsen* v. *Cabburn* (*b*). That this Court will not grant an injunction which will have the effect of compelling part performance only. Again, that no instance could be adduced, in which a Company had been restrained from exercising the right of going to Parliament, in cases where the interest of the public was concerned. That, at every session of Parliament, Acts of Parliament were applied for, to modify, vary, and change existing powers of Companies, and no individual had a right to interfere with the discretion vested in Parliament, as to granting the powers sought by a public body: *The Stockton and Hartlepool Railway Company* v. *The Leeds and Thirsk Railway Company* (*c*).

Mr. *Roundell Palmer* and Mr. *Amphlett*, contrà, contended, that the agreement contained an alternative, and that the

(*a*) 12 C. & F. 248. (*b*) 2 Ph. 56. (*c*) Ante, Vol. 5, p. 691.

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part of the agreement which required the conversion of the canal having been done away with, the plaintiff had the power of granting the canal and lands, so as to satisfy the terms of the agreement. That there was a great difference between the present agreement and one which the Court will not enforce, because they cannot compel its performance in its entirety; if they could not compel the positive part of the agreement, they would not hesitate to enforce the negative part of it. If a party, against whom an agreement cannot be enforced, does his part, the Court will, so far as it has jurisdiction, compel the performance of it by the other party: *Dietrichsen* v. *Cabburn* (*a*), *Great Western Railway Company* v. *Birmingham and Oxford Junction Railway Company* (*b*). That it was by no means clear that the Court would not interfere to compel specific performance of that which would form a continuous engagement: *Tulk* v. *Moxhay* (*c*), *Storer* v. *The Great Western Railway Company* (*d*). That no sound distinction could be taken between restraining a Company and restraining an individual from going to Parliament, if they had contracted themselves out of their powers. That it was clearly within the jurisdiction of Courts of equity to restrain the inequitable use of legal rights. The following cases were also cited: *Brocklebank* v. *The Whitehaven Junction Railway Company* (*e*), *Price* v. *The Mayor, &c. of Penzance* (*f*), *Ware* v. *The Grand Junction Waterworks Company* (*g*), and *London and North Western Railway Company* v. *Smith* (*h*).

Mr. *Bethell*, in reply, contended, that the performance of the agreement was impossible; and that, if it were possible, the Court would not compel the specific performance of a contract for making a railway: *Lane* v. *Newdigate* (*i*), *Flint* v. *Brandon* (*k*).

(*a*) 2 Ph. 52.
(*b*) Ante, Vol. 5, p. 241.
(*c*) Ante, Vol. 3, p. 106.
(*d*) 1 H. & T. 105.
(*e*) Ante, Vol. 5, p. 373.
(*f*) 4 Hare, 506.
(*g*) 2 R. & M. 470.
(*h*) Ante, Vol. 5, p. 716.
(*i*) 10 Ves. 192.
(*k*) 8 Ves. 159.

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June.

The LORD CHANCELLOR reserved his judgment, giving the Company leave to comply with the Standing Orders, notwithstanding the injunction.

The LORD CHANCELLOR(a) delivered the following judgment to the parties, before he resigned his office.—The injunction which was granted by the Vice-Chancellor of England, and which this motion seeks to dissolve, in substance restrains the defendants from making any application to Parliament for obtaining any Act authorising them to abandon or relinquish the Silverdale and Apedale Branch Railways, or either of them, or to authorise anything whatever to be done or omitted to be done, inconsistent with or repugnant to the covenant contained in an indenture of the 10th of October, 1846. By this covenant the defendants agreed with the plaintiff, that they would in the then next session of Parliament apply for and use their utmost endeavours to obtain a distinct and separate Act, empowering and requiring them to make and construct a branch line of railway, commencing by a junction with the Company's Silverdale branch from the North Staffordshire Railway (Pottery Line), at or near to Newcastle-under-Lyne, and terminating at or near to the furnaces at Apedale; and that they would with all practicable expedition, after such authority should have been obtained, complete and open for use the said Apedale Branch Railway, at their own expense in all things, and would for ever thereafter maintain the same at the like expense. It will be observed, that the proposed Act was to authorise the Apedale branch; the authority for the Silverdale branch had been obtained by an Act of the session of 1846, but the Apedale branch was to run into, and so in part form one with the Silverdale. In 1847, an Act for making the Apedale branch was accordingly applied for and obtained, authorising, but not otherwise requiring, the Company to make such branch; but no part of it has ever

(a) Lord *Cottenham*.

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been made; and the supplemental bill states a notice, dated the 30th of November, 1849, on the part of the defendants, sufficient for the purpose of an injunction, to shew an intention of applying to Parliament for an Act to authorise them to relinquish the formation of the Silverdale and Apedale branches; and the questions are, *first*, whether this Court has jurisdiction to interfere by injunction to prevent such application to Parliament; and *Secondly*, if it has, whether a proper case is made for the purpose.

Upon the first point it has been suggested, that this Court could not interfere without infringing upon the privileges of Parliament. So the Courts of common law thought at one time; but there is no foundation for such a supposition. In both cases, this Court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said, here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill, or a bill respecting property; but what would be a proper case for that purpose, it may be very difficult to conceive. The case of Parliament differs widely from that of the Courts of common law. The province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal rights; but the ordinary province of Parliament in such bills, is to abrogate existing rights, and to create new ones. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold, that this Court should by its injunction deprive the subject of the benefit of parliamentary interference in all such cases. In marriage settlements, there is often a want of some power, essential to the proper management of the property. Parliament is in the habit of exercising its discretion in supplying the defect; but if any party interested could obtain an injunction against such proceeding, upon the ground that what was proposed would inter-

fere with his estate and interest, Parliament would have no opportunity of exercising its discretion. So in Railway Acts, every owner on the line of the intended railway has an interest in the exercise of the powers asked; the promoters of the bill ask for powers to interfere with their interests, and to take land which the owners may be most anxious to retain; but it has never been suggested, that the Court could interfere by injunction to prevent the promoters from presenting such bill.

The injunction, therefore, cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of the Act to do so. What difference then can it make, whether such pre-existing rights exist by the tenure of property, or by virtue of contract? In both cases, Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does, or intends to do, compensation to the party affected; and in neither case has this Court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise.

It is also to be observed, that the contract which the plaintiff seeks to preserve is one which this Court cannot specifically perform; it cannot decree the Company to make the two branch lines in question; but they, having obtained power to make them, and having covenanted to make and maintain the Apedale branch, in which the plaintiff has an interest, and neglecting or refusing to perform such covenant, may be liable at law for such neglect or refusal; and to enforce such liability is the whole of the right which the plaintiff can have under this covenant. But, does that which the plaintiff alleges the defendants are seeking to obtain from Parliament, interfere with such right? The object of the application to Parliament is to authorise the Company to relinquish the forma-

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tion of these two branches, and not to relieve them from liability in respect of any contracts into which they may have entered, in contemplation of making them. Suppose they had agreed for the purchase of land in the line of the Apedale branch, although they relinquish the formation of the line, they may still be liable to complete the purchase; and could the owner obtain an injunction to prevent the defendants obtaining an Act to authorise such relinquishment? It is well known, that after those Companies have involved themselves in all the difficulties and liabilities incident to such undertakings, the aid of Parliament, or of some authority derived from Parliament, is necessary to extricate them; but this does not necessarily extend to protecting them against liability to contracts which they may have entered into. It is not alleged in the supplemental bill, that any such protection is intended to be the object of the Act applied for, and if it were, it would only shew that the plaintiff has an interest in the subject-matter of the petition to Parliament, which would probably entitle him to be heard upon it. The covenant is a merely legal contract, which the Act asked for may prevent the defendants from performing, but that is all. If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods? If indeed A. had agreed to sell an estate to B., and then proposed to deal with the estate so as to prevent him from performing his contract, equity would interfere, because in that case B. would by the contract have obtained an interest in the estate itself, which in the case of the goods he would not.

Independently, therefore, of the objection, that the injunction restrains an application to Parliament, for a purpose which the plaintiff has no right to control, there is, I think, a want of equity, arising from the nature of the contract itself; and I am therefore of opinion, that the injunction ought to be dissolved, and the motion before the Vice-Chancellor refused, with costs.

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BEFORE THE LORD CHANCELLOR (a).

THE EAST AND WEST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY COMPANY *v.* GATTKE.

Nov. 30*th*, & *Dec* 2.

1851.

Feb. 11*th*.

Although the property of a landowner may not be taken or directly interfered with by a Railway Company in the formation of their line, yet, if it be injuriously affected, or consequential damage ensue to it by the execution of the works, a Court of equity will not interfere at the suit of the Company to restrain him from pursuing such remedies for obtaining compensation, as are given by the 68th section of the Lands Clauses Consolidation Act.

The judgment of the late Lord Chancellor *Cottenham* in *The London and North Western Railway Company* v. *Smith* (b) reviewed.

THE defendant in this cause had on the 11th March 1850, served the plaintiffs, the Railway Company, with a notice of that date, requiring them either to enter into a written agreement to pay the amount of his claim or to issue a precept to the sheriff to summon a jury for settling the amount of compensation in accordance with the terms of the 68th section of the Lands Clauses Consolidation Act (c).

The Railway Company thereupon filed their bill, praying that the defendant be restrained from taking any proceedings whatever against the plaintiffs under his notice, and from taking any proceedings to compel the plaintiffs to issue their warrant to the sheriff to summon a jury for settling the amount of compensation claimed by him, and also from bringing any action or taking any proceedings at law against the plaintiffs to recover the sum of 480*l.* claimed by him, or otherwise in respect of the proceedings, until further order.

The Vice-Chancellor *Wigram* granted the injunction *ex parte* and before appearance, considering that he was bound to follow the decision in the case of *The London and North Western Railway Company* v. *Smith* (b).

This was a motion to dissolve that injunction.

(a) Lord *Truro*.

(b) Ante, Vol. 5, p. 716.

(c) Sect. 68 enacts, "That if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions

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The facts as taken from the commencement of the Lord Chancellor's judgment are as follow:—

The Company, the plaintiffs in the present suit, were incorporated by an Act of Parliament, 9 & 10 Vict. c. cccxcvi., intituled "An Act for making a Railway from the East and West India Docks to join the London and Birmingham Railway at the Camden Town station, to be called 'The East and West India Docks and Birmingham Junction Railway.'" It appeared from the bill, that the Company had commenced their works, and were in the course of constructing their railway; that in September, 1849, the defendant made a claim against the Company for the sum of 480*l.*, as compensation due to him for damage and in-

of this or the special Act, or any Act incorporated therewith; and if the compensation claimed in such case shall exceed the sum of 50*l.*; such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking, of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims such compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts."

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jury alleged to have been sustained in consequence of the dust and dirt occasioned by the Company having damaged his goods, and by his customers having been compelled by the obstruction occasioned by the plaintiffs' works to quit the side of the road on which the defendant's shop was situate and to pass on the opposite side, by reason whereof during several weeks he had sustained great loss in his trade; and the defendant also alleged, that he had been injuriously affected and injured by the Company having stopped up a lane or passage along which he was entitled to a right of way to an entrance at the back of his premises.

The bill then alleged that no part of the defendant's premises was inserted in the schedule to the special Act, and that no part of those premises had been taken, used, or interfered with by the works of the Company, and that therefore the defendant had no claim to compensation under the provisions of the statute; and it also alleged that several matters complained of by the defendant were wholly false and without foundation, and that they had therefore declined to comply with his demand to pay his compensation or to issue a precept.

The bill then stated that the defendant had required the Company to enter into a written agreement to pay the amount of his claim, or to issue the precept to summon a jury, and that the Company refused to do so for the reasons before stated; and they alleged that the issuing of such precept would operate as an admission of title in the defendant to compensation, and the jury would have no jurisdiction to consider or decide upon that question under the statute; but that, omitting to issue the precept, the defendant would acquire a right to recover the whole amount of his claim, with costs, unless the Court interfered to restrain him; and further, that the statute contained no provision by virtue of which the right or title of the defendant to compensation could be legitimately tried

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and decided, and that such question could not be determined without the aid of the Court.

The bill then prayed a declaration that the defendant was not entitled to any compensation; and that, if necessary, an issue might be directed to try whether the interest of the defendant had been injuriously affected by constructing the works of the Railway Company, and that the defendant might be restrained in the manner hereinbefore mentioned.

The defendant put in his answer to the plaintiffs' bill on the 7th June, 1850, wherein he stated his interest in the premises; he admitted that no part of his premises had been taken, used, or directly interfered with by the works of the Company; but he stated that they had been injuriously affected within the meaning of the Lands Clauses Consolidation Act, and insisted on his right to compensation. The defendant then moved, before Vice-Chancellor *Knight Bruce* sitting for Vice-Chancellor *Wigram*, to dissolve the injunction; but he declined to entertain the application.

The *Attorney-General* and Mr. *Grove*, in support of the motion to dissolve, took a preliminary objection to the form of the injunction, on the ground that the Court never granted a special injunction (which this in fact was,) upon affidavit merely, before appearance or answer; they then contended that the decision in *The London and North Western Railway Company* v. *Smith* could not be maintained; that even if it were right in principle no advantage would be gained by the course of proceeding which that decision prescribed, for the same action must be brought in consequence of the injunction, which would have been to be tried had there been no such order. That the bill stated no case for relief in equity, for it was founded on an issue of fact, whether injury had been sustained or not. That a Court of equity could not decide this question;

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but the legislature had wisely provided the means of deciding it, and of ascertaining the amount of compensation by a sheriff's jury, so as to prevent powerful Companies, by the aid of litigation, from exacting oppressive contracts from the landowner. That, for this very reason, the mode of proceeding by mandamus had been done away with. That a Court of equity could not derive its jurisdiction from the severity of an enactment, neither could it repeal or interfere with the provisions of an Act, however extraordinary they may appear, and if it said you shall first settle the quantum and then the right, no other course could be pursued. That a suit in a Court of equity, to restrain the assessment before the determination of the right, was, at all events, a much more serious injury to the landowner than the assessment of his claim could be to the Company. That this difference existed between the present case and the case decided by Lord *Cottenham*, that in this there was no question of law, and only a question of fact, and that this was a personal injury; while in the latter the facts were not disputed. But it was contended, that, admitting the facts to be as stated in the bill, the defendant had no right to compensation; and that the injury was not particular, but in the nature of a public nuisance. That, in the present case, the defendant was clearly entitled to compensation, if the facts which he alleged were substantiated. That the remedy given by the 68th section was not confined to injury to property taken by the Railway Company, or within their limits of deviation: *Regina* v. *Eastern Counties Railway Company* (*a*), and *Bell* v. *The Hull and Selby Railway Company* (*b*). That there had not been any oversight in the wording of the 68th section of the Lands Clauses Consolidation Act, for that clause had been distinctly referred to by the 6th section of the Railway Clauses Act; but even if the Act were imperfect, a Court of equity could not give a remedy: *Frewin* v. *Lewis* (*c*).

(*a*) Ante, Vol. 2, p. 736. (*b*) Ante, Vol. 1, p. 616.
(*c*) 4 My. & Cr. 249.

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That the case shewn by the plaintiffs' bill did not require the interposition of a Court of equity, for they would obtain the same relief they now sought from a jury summoned under the provisions of the Lands Clauses Consolidation Act.

Mr. *Wood* and Mr. *Hetherington* contrà, contended, that the case of *The London and North Western Railway Co.* v. *Smith* was precisely the same as the present; and that in fact the present bill was a transcript of that in the case referred to. That the important question which created the struggle between the parties was, whether persons whose lands were not touched by the railway, were to be considered to stand on the same footing with respect to compensation for injury, as those whose lands were taken. That that case decided the principle, that the legislature gives damages for direct, but not for incidental injury. This was also decided at law in *The King* v. *The London Dock Company* (*a*). That the proceedings of the defendant were merely an indirect mode of raising the question of right to compensation, which the legislature had already refused to entertain. That it was fair to presume, that the legislature had weighed the incidental or collateral injury to individuals against the benefit to arise to the public from the formation of the railway. That it would be impossible to place any limits to the claims for compensation which would be preferred, if every one claiming to be entitled could compel the Company to summon a jury at their expense, which jury could not determine the legal right, but only the quantum. That the party claiming must shew his right before he could proceed under the 68th section. That the words "if any person shall be entitled," could not mean "claim to be entitled." The fact of the defendant's right is not settled by his claim he must first prove his right: *The South Western Railway*

(*a*) 5 Ad. & E. 163.

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Company v. *Coward* (*a*). If he had been plaintiff instead of defendant he would have been obliged to substantiate his claim. That he was in fact defeating the Act by proceeding without title, the Act only providing for those cases in which the Company had admitted the right by serving a notice or taking the land. That the bill was not filed to restrain proceedings at law, but to prevent a party from compelling the Company to pursue an inequitable course, which would have the effect of admitting his claim, which could not otherwise be enforced. That the jury had no means of deciding the question of title to compensation, which often was a complicated one of law and fact: *Ex parte Chabot* (*b*).

The *Attorney-General* replied.

[In the course of the argument, the Lord Chancellor said, that he entertained great doubt whether any action could be brought, even under the direction of the Court, which would try the right of the party claiming. That the legislature had provided no other tribunal for deciding the right than the jury; and that he had often argued questions of the right to compensation before juries summoned under the City of London Improvement Acts. His Lordship also cited a case of *Wilkes* v. *The Hungerford Market Company* (*c*), as shewing that compensation was not confined to direct, but was extended to incidental injury.]

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The LORD CHANCELLOR.—[After stating the facts as hereinbefore set forth.]—Now it will be observed, that the case of the plaintiffs rests upon two grounds. It was contended that the Lands Clauses Consolidation Act imposes no liability upon the Company to make compensa-

(*a*) Ante, Vol. 5, p. 703. (*b*) 12 Jur. 1023.
(*c*) 2 Bing. N. C. 281.

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tion for indirect injury arising from the construction of the works; but the compensation is only given in respect of premises actually taken, used, or injuriously affected by an immediate and direct meddling or interfering with them, which the answer admits has not been done in the present case. Secondly, it was alleged that the defendant has, in fact, sustained no damage whatever from the Company's works; and upon these grounds, and especially the first, the plaintiffs insist that the defendant ought to be restrained in equity from forcing the Company to issue the precept, and from commencing any action to recover the amount of his claim by reason of their omitting to do so; and that this Court ought to declare that the defendant is not entitled to compensation, or to send the question under proper directions to a Court of law for decision. The Vice-Chancellor *Wigram* granted the injunction as prayed; and his decision appears to have been founded upon principle and upon the authority of the decision of Lord *Cottenham* in the case of *The London and North Western Railway Company* v. *Smith* (*a*). The object of the present application is to dissolve that injunction.

Now the first and most important point to be considered is, whether upon a correct construction of the statute of the 8 Vict. c. 18, the defendant is within the class of persons entitled to compensation; in other words, is he the occupier of land which has been injuriously affected by the works of the Company. The only sections of the Act that appear to have any particular relation to this question are the 22nd and the 68th, and they are to the following effect:—By the 22nd section it is enacted, "that if no agreement be come to between the promoters of the undertaking and the owners of, or parties by this Act enabled to sell and convey or release, any lands taken, or required for, or injuriously affected by the execution of the under-

(*a*) Ante, Vol. 5, p. 716.

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taking, or any interest in such lands as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.*, the same shall be settled by two justices." By the 68th section (*a*), compensation is given in respect of land or any interest therein which shall have been taken for or injuriously affected by the execution of the works of the Company.

I am not aware that the two sections to which I have adverted, have ever received a judicial construction; but it appears to me, that the sections and expressions contained in other Acts of Parliament of the same import as those on which this case depends, have come under judgment, and these ought to be decided by the rule of construction which has been applied to Railway Acts and other Acts of the same nature, which is, that they are to be liberally expounded in favour of the public, and strictly as against the Company. The authorities upon this rule are so well known, that it cannot be necessary to enter particularly into them. The case of *The Queen* v. *The Eastern Counties Railway Company* (*b*), arose upon an Act of Parliament 6 & 7 Will. 4, c. cvi. and Lord *Denman* remarked, " before we advert to the provisions of this particular Act, we think it not unfit to premise that where such large powers are entrusted to a Company to carry their works through so great an extent of country, without the consent of the owners and occupiers of lands through which they are to pass, it is reasonable and just that any injury to property, which can be shewn to arise from the prosecution of those works, should be fairly compensated to the party sustaining it." These remarks I think are reasonable; and I think it is to be presumed, that all the Acts of Parliament which have been

(*a*) See note ante, p. 371.
(*b*) Ante, Vol. 2, p. 752; *S. C.*, 2 Q. B. 347.

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passed since that time, are embraced within them, and have been passed in reference to such a view, liable, however, to be qualified and rebutted by the contents of the particular Act of Parliament to which they are to be applied.

The statute of the 6 & 7 Will. 4, c. cvi. upon which the case of *The Queen* v. *The Eastern Counties Railway Company* arose, incorporated the Company for the purpose of constructing an extensive line of railway; and by the 9th section of that statute, power is given to the Company to take the land for the purposes of the railway, and to construct a vast variety of works, and to do all other things necessary and convenient for constructing, altering, and using the railway; and then the statute contained the following words: "the said Company making full satisfaction, in manner hereinafter mentioned, to all persons interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted." The 29th section of the same statute contained the direction for trying and determining disputed claims for compensation; and by that section the jury were directed to assess and give a verdict for the sums to be paid for the purchase of land, and the sum to be paid by way of satisfaction for the damages which had been before that time done or sustained, or for or by reason of severance of land; and then it contained these words, "which satisfaction, recompense, or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used."

In that case compensation was claimed upon the ground that the party was interested in land injured by reason of the execution of the powers granted by the Act; but it appeared that such injury was not occasioned by any direct interference with the land, nor was any part of the land taken, but was consequential upon the works of the Company. The

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injury, in respect of which compensation was claimed, arose from the Company having lowered a road adjoining the plaintiff's premises, by which access was impeded, and additional fences were alleged to be rendered necessary. It was contended on the part of the Company, that sections 9 and 29 ought to be construed in connection; and that the direction in respect of the form of the verdict, and what it should contain, shewed that the compensation referred to in the 9th section was intended only to be given to persons whose lands were taken and used, or directly interfered with; and that the consequential damage gave no right to compensation. It seems to have been scarcely contested, that the 9th (*a*) section, uncontrolled by the 29th (*a*), would have entitled the party to compensation. Lord *Denman* in giving the judgment of the Court says, that sect. 9 in terms comprehends cases of injury, independently of taking land; and next it is assumed, that the satisfaction to be so made (which, if parties could not agree, must refer to the 29th the compensation clause,) is to extend to all the cases of injury, one of which is injury to any person, whether his land is taken or not. The argument urged in that case appears to have been, that as the jury were specially directed under the 29th clause to find as to matters applying to land taken and damaged thereby, it must have been intended that the jury were to make compensation for no other matters; the Court, however, held, for the reasons assigned, that the 29th section did not control or limit the 9th, and by the 9th the intention was plainly to give compensation to persons whose lands were not taken but had sustained consequential injury. Now the material words of the 9th section of the 6 & 7 Will. 4, c. cvi. are, "that the Company are to make full compensation to all persons interested in any lands which shall be taken, used, or injured, for all damage sustained by reason of the execution of all or any of the powers granted by the Act" (*a*), it will

(*a*) These sections are set out, ante, Vol. 2, p. 73*

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be found on comparing those words with the words in the 68th section of the 8 Vict. c. 18, the Act of Parliament which governs the present case, that the clauses cannot be distinguished, and that the same construction must apply to both. The question which arises upon the sections which I have compared is precisely the same, that question being simply, whether compensation is limited to damage sustained by persons whose lands or part of whose lands are taken, used, or directly interfered with, and whether the right of compensation is excluded as to consequential damage. The judgment of the Court of Queen's Bench was deliberately considered, and the Court acted upon it by directing a peremptory mandamus to the Company to issue their precept.

The 68th section, which we have now to consider, expresses the same meaning, and ought to receive the same construction, especially when it is remembered that the judicial construction of the sections of the 6 & 7 Will. 4, c. cvi., to which I have referred, was pronounced in Michaelmas Term, 1840, and the section in question was enacted in the 8th year of her present Majesty, in March, 1845; and it cannot be reasonably supposed that the framers of the 8 Vict. c. 18, were not aware of that judicial construction, still less that the framers of the Act, under which this Company was incorporated, were ignorant of it; and who, if the compensation to be given by that Act was intended to be more restricted than the decision in the Queen's Bench contemplated, would doubtlessly have procured some legislative enactment more distinctly expressive of the intended restriction.

The only ground of equity raised by this bill is founded upon the question, whether the 22nd and 68th sections entitle any other persons to compensation than those whose lands are taken or directly interfered with. The defendant's land not being so circumstanced, I think that the judgment of the Court of Queen's Bench is a satisfactory answer to that, and that the only ground

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of equity fails, and therefore the injunction ought to be dissolved.

It was strongly argued on the part of the plaintiffs, that the case of *The London and North Western Railway Company* v. *Smith* (*a*) governed the present case, and that the injunction in this case could not be dissolved without overruling that decision. If the question in this case were precisely the same as that determined in the case referred to, I should yield to its authority; because I do not think it would be proper for me to overrule a former recent judgment of this Court, as such a course of proceeding must introduce great uncertainty in the law of the Court; it is more fit under such circumstances that the case should be overruled, if at all, by an Appellate Court. I may, however, state that I should not deem it right, for reasons which will hereafter appear, to extend the application of the principle of that decision, although at the same time I disclaim the intention to overrule it. I think this case is quite distinguishable from the case of *The London and North Western Railway Company* v. *Smith*, upon the following grounds:—In that case compensation was claimed solely upon the ground of injurious affection resulting from the pernicious stoppage of what, at the time of the Company's Act, was a public highway. No damage or injury was sustained by the plaintiffs but what in a greater or less degree applied to all the Queen's subjects; and the question was a question of law, which seems to approximate very nearly to the question decided in the case of *The King* v. *The Bristol Dock Company* (*b*), in which case compensation was claimed by certain brewers, who were in the habit of using the water of the river Avon for brewing, by reason of the Dock Company having rendered the water unfit for that purpose in the construction of their works; but the Court held, that no such appropriation of the water had taken place, as to give the claimants more right to com-

(*a*) Ante, Vol. 5, p. 716. (*b*) 12 East, 429.

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pensation than any other individual of the public who had been in the habit of getting water from the river. The complaint in substance was a public nuisance, for which an indictment would have been the only remedy, if the legislature had not authorised it to be done. In that case the injury complained of was common to the public, as it was also in the case of *The London and North Western Railway Company* v. *Smith;* and it might reasonably be contended that the case of *The King* v. *The Bristol Dock Company* was a direct decision against the validity of that claim. In this case the claim is personal and individual, and is supported by a distinct decision of the Queen's Bench; and upon the authority of that case, I think the defendant is entitled to have his compensation assessed by a jury; therefore the injunction, as I said before, ought to be dissolved.

The application of the principle of the decision in *The London and North Western Railway Company* v. *Smith* to this case and others of the same nature would operate very hardly upon the claimant, and would, I think, defeat an intention clearly entertained by the legislature, of giving summary remedy for assessing and recovering compensation; and experiments like the present, if successful, would deprive claimants of a small amount of any compensation, by the costs necessarily incident to such a course of proceeding, which would defeat the intention of the Act of Parliament.

Prior to those general Acts which have been incorporated into all special railway Acts, the remedy to compel Companies to issue the precept was by mandamus; upon the return to which writ, the right to compensation was discussed and decided; but the use made of that course of proceeding was found to cause so much delay and expense, that the legislature gave a summary remedy against railway Companies to compel a more speedy issuing of the precept; and for that purpose they have enacted, that if any party claiming compensation requires the Company

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to issue the precept, they shall be compellable so to do, at the peril, if they do not, should the party be found ultimately entitled, of paying the full amount of the claim.

This proceeding has nothing anomalous in its principle; it is incident to every common case of injury and damage, where the existence of injury, the right to compensation, and the amount of damage alleged to have been sustained, are all tried and decided in one proceeding and upon one trial. The requisition for the precept in this case was analogous to the commencing of an action; and upon the execution of the inquisition it was competent for the tribunal to decide upon the question whether any injury within the meaning of the Act had been inflicted by the Company, and whether any damage had been in consequence sustained: the course prescribed excluding all inquiry upon either of these points prior to the execution of the inquisition.

It seems to have been doubted, in the course of the argument, whether by issuing the precept the Company would not be taken to have admitted the right to compensation; but I do not see any ground for that conclusion. If the legislature has made it the duty of the Company to issue the precept, at the peril, if they do not, of payment of the whole amount of compensation claimed, in the event of the plaintiff being found entitled, the performance of that imperative duty cannot operate as an admission on the part of the Company. After the compensation jury shall have decided that the claimant has sustained damage, for which he is entitled to be compensated, the claimant has to enforce payment by a formal proceeding for that purpose, which used to be by a mandamus; and if the jury had no jurisdiction to decide upon the right, it followed that the question of the right might be raised upon the return to the mandamus; but since the decision of *Corregal* v. *The London and Blackwall Railway Company* (*a*) and *Williams* v.

(*a*) Ante, Vol. 3, p. 411; *S. C.*, 5 M. & G. 219.

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The application of the principle of the decision in *The London and North Western Railway Company* v. *Smith* to this case and others of the same nature would operate very hardly upon the claimant, and would, I think, defeat an intention clearly entertained by the legislature, of giving summary remedy for assessing and recovering compensation; and experiments like the present, if successful, would deprive claimants of a small amount of any compensation, by the costs necessarily incident to such a course of proceeding, which would defeat the intention of the Act of Parliament.

Prior to those general Acts which have been incorporated into all special railway Acts, the remedy to compel Companies to issue the precept was by mandamus; upon the return to which writ, the right to compensation was discussed and decided; but the use made of that course of proceeding was found to cause so much delay and expense, that the legislature gave a summary remedy against railway Companies to compel a more speedy issuing of the precept; and for that purpose they have enacted, that if any party claiming compensation requires the Company

to issue the precept, they shall be compellable so to do, at the peril, if they do not, should the party be found ultimately entitled, of paying the full amount of the claim.

This proceeding has nothing anomalous in its principle; it is incident to every common case of injury and damage, where the existence of injury, the right to compensation, and the amount of damage alleged to have been sustained, are all tried and decided in one proceeding and upon one trial. The requisition for the precept in this case was analogous to the commencing of an action; and upon the execution of the inquisition it was competent for the tribunal to decide upon the question whether any injury within the meaning of the Act had been inflicted by the Company, and whether any damage had been in consequence sustained: the course prescribed excluding all inquiry upon either of these points prior to the execution of the inquisition.

It seems to have been doubted, in the course of the argument, whether by issuing the precept the Company would not be taken to have admitted the right to compensation; but I do not see any ground for that conclusion. If the legislature has made it the duty of the Company to issue the precept, at the peril, if they do not, of payment of the whole amount of compensation claimed, in the event of the plaintiff being found entitled, the performance of that imperative duty cannot operate as an admission on the part of the Company. After the compensation jury shall have decided that the claimant has sustained damage, for which he is entitled to be compensated, the claimant has to enforce payment by a formal proceeding for that purpose, which used to be by a mandamus; and if the jury had no jurisdiction to decide upon the right, it followed that the question of the right might be raised upon the return to the mandamus; but since the decision of *Corregal* v. *The London and Blackwall Railway Company* (*a*) and *Williams* v.

(*a*) Ante, Vol. 3, p. 411; *S. C.*, 5 M. & G. 219.

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Jones (*a*) it seems that the remedy of the claimant is by action upon the judgment; and the pleadings referred to in *Corregal* v. *The London and Blackwall Railway Company* in such an action shew, that the right might be well disputed, supposing, as before stated, the compensation jury had no jurisdiction to decide the question. The argument founded upon the supposed admission on the part of the Company I think therefore fails. It has also been assumed in the argument, that the compensation jury have no jurisdiction to decide the question of right; but during the many years that compensations have been assessed, that is, ever since the passing of the London and West India Docks Acts, fifty years ago, questions upon the construction of the compensation clauses have constantly arisen before the Recorder of London and other presiding officers, and of necessity have been decided by him and a jury. Such questions of construction have arisen incidentally and directly, and have been decided upon the trial. The jurisdiction of the jury has been frequently recognised. In the case of *The Queen* v. *The Lancaster and Preston Junction Railway Company* (*b*), the jury found the claimant had sustained no damage; and upon application for a mandamus to compel the Company to issue a new precept, the Court refused to do so, and therefore upheld the inquisition. Lord *Denman*, in giving judgment, after speaking of the duty of the jury, says, "They are to inquire and assess the damages, and even if the counsel be right in his argument, that the issuing of the warrant admits the fact of some damage, that admission cannot bind the jury. The question whether any damage has been sustained, or not, is inseparable from the question how much damage has been sustained. The words in the warrant, therefore, though it would have been better if they had been omitted, do not alter the duty of the jury; and all parties are bound

(*a*) 13 M. & W. 628.

(*b*) Ante, Vol. 3, p. 725; *S. C.*, 6 Q. B. 759.

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by this verdict; and if the proceedings shew on their face a defect of jurisdiction, a certiorari is not wanted." Mr. Justice *Coleridge* said, "The only questions are as to the form of the warrant and the conduct of the jury. The words "if any," though it would be better if they were away, do not affect the validity of the warrant; for though the inquiry may go only to the quantum, that quantum may be nothing. The jury cannot be expected to give a farthing: strictly speaking, such a finding, if there were no damages, would be a violation of their oath, as much as the finding of a large sum." In these opinions Mr. Justice *Patteson* and Mr. Justice *Wightman* concurred.

In the case of *The Queen* v. *The Eastern Counties Railway Company* (*a*), the claimant tendered evidence under a certain head of claim; and the under-sheriff rejected the evidence, upon the ground that by the Act the compensation jury had no jurisdiction to assess compensation under that head of damage; and upon a motion afterwards made for a mandamus for a new precept, it was refused, upon the ground that it was in effect an attempt in another form to review the decision by a new trial, which the party could not do; therefore, the power of deciding how far a particular head of claim came under the consideration of a jury was recognised.

In the case of *The Queen* v. *The Eastern Counties Railway Company* it was also objected, that evidence had been improperly received of deterioration in the value of the property by the construction of the works; and the Court said, that such evidence was receivable to shew jurisdiction, plainly importing that the question of jurisdiction was within the province of the presiding officer and compensation jury upon the execution of the inquisition. The assumption, therefore, that the presiding officer and jury had no jurisdiction to construe the Act upon the

(*a*) Ante, Vol. 3, p. 460.

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point whether the claim made for compensation was or was not within its provisions, is founded on mistake; but it was said, that the tribunal is not such that it was competent to discharge the duty of deciding questions of law and construction; but the real question is, has the statute given them that power? If it has, a serious question arises as to the competency of any Court to withdraw that power and jurisdiction from them. It is urged that a course has been prescribed more inconvenient than the delay and expense of a mandamus. But what is the course which this Court is asked to substitute for that statutory form? Instead of going to a jury and assessing the compensation, and leaving the question of right to be afterwards decided, the Court is asked to subject the claimant, how small soever the claim may be, to a suit in Chancery, in which the question involved is admitted to be a question of law, which a Court of equity is not competent to decide, and then the Court is asked to send the question to a Court of law for decision by an action. The proceedings in this Court are liable to an appeal to the House of Lords, when, if the party succeeds in his appeal, he gets no costs. An action is subject to a bill of exceptions, and then to a writ of error, and afterwards to an appeal to the House of Lords, the delay by such a course of proceeding cannot be predicted. In case the result be favourable to the claimant, he has then to begin a course of proceedings to obtain compensation, and all this is brought upon the claimant by reason of the legislature having attempted to give a short remedy, with a view to avoid delay and expense.

The means of Companies to prosecute litigation, cannot be compared with those of individual claimants. The claimant's interest is expedition, that of the Company is delay.—If the claim be of moderate amount, it must be often ruinous to the claimant to enter into a conflict with a Company. To leave such a course open to a Com-

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pany, is always unwise, for the Company by making an example of one complainant, would in all probability succeed in deterring many others from advancing what might be their just claims. It is also to be observed, that if the course pointed out by the statute is inconvenient, or open to the objections that have been urged, the Company are much more responsible for that inconvenience than the plaintiff, for the Company had the opportunity of satisfying Parliament, if they could, of the unreasonableness of that course and of suggesting a more just one.

In this case I see no reason to doubt, if the defendant has in fact sustained damage in the manner he has alleged, he is a person entitled to compensation, and under the statute he is entitled to have that question submitted to a jury. The injunction therefore must be dissolved with costs.

BEFORE VICE-CHANCELLOR LORD CRANWORTH.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY *v.* HALL (*a*).

Feb. 24th & 26th. March 22nd.

Although the property of a landowner may not be taken or directly interfered with by a Railway Company, in the formation of their line, yet, if it be "injuriously affected," or consequential damage ensue from the execution of the works, a Court of equity will not interfere, at the suit of the Company, to restrain the landowner from pursuing the remedies for obtaining compensation given to him by the 68th section (*b*) of the Lands Clauses Consolidation Act.

The judgment of Lord Chancellor *Cottenham* in *The London and North Western Railway* v. *Smith* (*c*) reviewed.

THIS was a motion to dissolve an injunction granted by his Lordship ex parte, on the 2nd January, in the form of the prayer of the plaintiffs' bill, to restrain the defendants from taking any proceedings whatever against the above-named Company, under or pursuant to the notice of the defendants dated the 2nd December, in the plaintiffs' bill set forth, and from taking any other proceedings

(*a*) See preceding case. (*b*) This section is set out, ante, p. 37.

(*c*) Ante, Vol. 5, p. 716.

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under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, or either of them, or otherwise for settling the amount of compensation claimed by the defendants in the bill mentioned, until answer or further order.

The defendants were J. Hall, W. Robinson, and J. Knight, who were tenants in fee, according to the custom of the manor of Longdon, of a farm-house and lands, called Hill Cottage Farm, distant 710 feet from the boundary line of the plaintiffs' railway.

The bill stated the several Acts of Parliament, under which the plaintiffs, the Railway Company, were incorporated, and that, under the powers thereby given to them, they proceeded to make their railway, and carried it nearly at right angles and on the level across the road leading from the village of Streethay to the defendants' farm.

That on the 12th December, 1850, the defendants caused a notice to be served on the plaintiffs, claiming from them, under the 68th section of the Lands Clauses Consolidation Act, a sum of 550*l.* by way of compensation for damage occasioned to their farm by reason of the railway crossing the road, which was the only road to it; and the defendants called on the Company, either to pay the sum of 550*l.* which they so claimed, or else to summon a jury to assess the amount of the damage.

The bill charged that the carrying the railway across the road in question was not an injurious affecting of the defendants' farm within the true intent and meaning of the 68th section of the Lands Clauses Consolidation Act; and it prayed, among other things, an injunction in the form hereinbefore given.

Mr. *J. Parker* and Mr. *Willcock*, in support of the motion, contended, that this case did not at all differ from that of *The East and West India Docks and Birmingham*

Junction Railway Company v. *Gattke* (*a*), which had overruled the decision of Lord Chancellor *Cottenham* in *London and North Western Railway Company* v. *Smith* (*b*). But even if a distinction could be drawn between the cases so decided, a broader one prevailed in this case, for the present was strictly a private injury. Neither was there in this case a doubt as to the existence of an injury in respect of which the defendants were entitled to compensation. Here the road was an easement to the farm, and independently of the obstruction caused by the railway the Company had made a descent of three feet on both sides of the railway, which was an obvious impediment to the communication between the farm and the village. That, at all events, the injunction granted in this case was not in accordance with the decision of the Lord Chancellor *Cottenham*, for the means of trying the legal right were not reserved in the present form of the injunction. That the fact of none of the defendants' land being actually taken did not affect the right to compensation, which was given in the event of the lands being injuriously affected: *Cooling* v. *Great Northern Railway Company* (*c*), *Regina* v. *Eastern Counties Railway Company* (*d*). That, under any view of the case, the interference of a Court of equity would be unnecessary, for, if there were no damage within the Act, as alleged by the bill, there would be a good defence to any action for the amount assessed by the jury; and if there were damage, then the Court ought not to interpose so as to deprive the injured party of his compensation. But however this may be, a Court of equity cannot control the right or mode of proceeding given by Act of Parliament; That the order, as it stands, cannot be right; the form of the order should have been the same as that in *Harman* v. *Jones* (*e*).

(*a*) See preceding case.
(*b*) Ante, Vol. 5, p. 716.
(*c*) 14 Jur. 128.
(*d*) Ante, Vol. 2, p. 736.
(*e*) Cr. & Ph. 299.

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Mr. *Bethell* and Mr. *Speed*, for the Railway Company, contended—That although virtually the proceeding by mandamus was taken away by the Act, there was nothing to affect or in any way interfere with the jurisdiction of Courts of equity to restrain parties from using in an inequitable manner the powers conferred on them by an Act of Parliament. That although Railway Companies could not now discuss the question of right to damage, on the application for a mandamus, yet this Court would restrain persons having no legal right from availing themselves of the penal provisions of the 68th section of the Lands Clauses Consolidation Act to enforce their claims. That the defendants' claim was not included in the 68th section, for that only applied to damage caused in the execution of the works, whereas the defendants now claimed in respect of injury caused by the completion of the railway. That the proper time for the defendants to complain was, when the Company were crossing the road or interfering with their property in a manner not authorised by their powers. That they might have then applied to this Court to restrain them by injunction; but they could not stand by and then prefer their claim for compensation under the 68th section: *Blakemore* v. *The Glamorganshire Canal Company* (*a*), *Webb* v. *The Manchester and Leeds Railway Company* (*b*), *Frewin* v. *Lewis* (*c*). That this Court will not interfere if the Company are within their powers, or if there is acquiescence. That it had not been pretended that they had exceeded their powers, or done that which they had not the power to do under their Act. That, admitting the damage not to be confined to that done in the execution of the works, and in the course of making the railway, the 68th section was only intended to apply to cases in which the land was "taken or injuriously affected" wrongfully, that is, where the Company had not complied with the required

(*a*) 1 My. & K. 154. (*b*) 4 My. & Cr. 120. (*c*) Id. 249.

formalities, or were proceeding without any authority or colour of title. That if nothing of this sort had been shewn, then the case was one within the ordinary rules of compensation given by the 23rd section, and not within the penal and extraordinary provisions of the 68th section. That in the case of *Cooling* v. *The Great Northern Railway Company* (*a*) the Company were content, and admitted the plaintiffs' right to compensation. That in *Regina* v. *The Eastern Counties Railway Company* the Court proceeded on the particular language of the Act, which was not the same as in the general Act. That in *Corregal* v. *The London and Blackwall Railway Company* (*b*) there had been an inquisition, at which the Company had attended, and had in fact admitted the right to compensation. That the present case must be governed by the decision in *The London and North Western Railway Company* v. *Smith*, and not by the decision in *Gattke's case*. In the latter, there had been a wrongful acting, the Company had proceeded with their works improperly, and therefore the property of the defendant may be said to have been injuriously affected; but when Companies do that which they are commanded to do, and the necessary consequence of such act is damage, then the common remedy for obtaining compensation only is given. That, in fact, no compensation for consequential injury is given under the Acts of Parliament. That the legislature entered into a compact with the Railway Companies, in which it represented the public, and the consequential injury to ensue was balanced against the benefit to arise from the formation of the line. If consequential injury was to be compensated, the owners of stage-coaches all over the kingdom might send in their claim for compensation in consequence of the utter destruction of their trade. That if the case were submitted to the sheriff's jury, they could only decide the question of fact, they could

(*a*) 14 Jur. 128. (*b*) Ante, Vol. 3, p. 411.

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not decide that of law; and the Company would be left without a remedy, the benefit of certiorari having been taken away by the 145th section of the Lands Clauses Consolidation Act: *King* v. *The London Dock Company* (*a*).

Mr. *Parker* in reply.—There is a great difference between taking land and depriving a landowner of an easement. He may prevent the Company from taking his land without first paying the price or depositing the value, in accordance with the terms of the Lands Clauses Consolidation Act; but with respect to an easement he has no right of action, and cannot prevent the Company from interfering with it. His only remedy is by compensation: *Thicknesse* v. *The Lancaster Canal Company* (*b*), *Hutton* v. *The South Western Railway Company* (*c*).

The 68th section is the only one which gives the means of ascertaining the amount of compensation for injury to an easement. There is no real distinction between damage and injury, they are correlative terms, and used in the same sense in the 49th and 63rd sections of the Lands Clauses Consolidation Act, and in the 6th section of the Railways Clauses Consolidation Act; this result would follow from the interpretation put on these words by the other side, that the Company would have to pay for all land and damage wrongfully done, but would not be bound to pay for any damage in pursuance of their powers, which is contrary to common sense.

The VICE-CHANCELLOR.—Upon an application ex parte on the filing of the bill, I granted the injunction in conformity with the prayer; and I did so on the authority of the case of *The London and North Western Railway Company* v. *Smith* (*d*): that case appeared to me to be an autho-

(*a*) 5 Ad. & E. 153.
(*b*) 4 M. & W. 491; *S. C.*, 5 B. & Ad. 605.
(*c*) 7 Hare, 259; and post.
(*d*) 1 Hall & T. 364; *S. C.* 1 M'N. & G. 216.

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rity precisely in point. There the complaint of Smith was, that the Company had carried their railway across a public street, (which, by their Act, they had authority to do), and so had greatly incommoded the inhabitants of one end of the intersected street, making the access to their houses much less convenient than it had theretofore been. Smith, as one of such inhabitants, had made a claim for compensation, and given the notice for summoning a jury; and the Company thereupon filed their bill to restrain Smith from proceeding on his notice, on the ground, as in this case, that the act complained of was not one in respect whereof they were liable to make compensation at all. The late Vice-Chancellor of *England*, in this state of things, refused an injunction; but Lord *Cottenham*, on appeal, granted it; and the ground of his decision was, that this Court will not permit a party to put in force the powers given him by the Act for assessing the amount of his damage, until he has first established his legal right to some compensation, (that is to say), until he has shewn that the damage complained of is damage in respect of which the 68th section of the Lands Clauses Consolidation Act entitles the plaintiffs to redress.

There is no mistake as to the grounds on which Lord *Cottenham* proceeded. The course which legislation has taken in these cases has been this: Formerly, the practice was to provide by each special Act, that the party claiming compensation should call on the Company to take steps for summoning the jury. If the Company considered the Act complained of to be one, in respect of which the statute did not entitle the claimant to compensation, they refused to cause the jury to be summoned, and the remedy of the claimant was to call on the Company by mandamus to take the necessary steps. In the application for a mandamus, the question whether the case was or was not one entitling the party to compensation, was judicially decided; if in the negative, the mandamus was refused, and

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there was an end of the case; if in the affirmative, a peremptory mandamus issued, the jury was summoned, and the amount of damage was assessed.

But, by the General Lands Clauses Act (whether by any previous special Acts I am not sure) this course of proceeding was departed from. The legislature relieved the party claiming compensation from the necessity of applying for a mandamus, by enabling him to fix his own amount of damages, where damage within the meaning of the statute had been incurred, and by compelling the Company to pay that amount, unless, within twenty-one days, they took measures for convening the jury. Where, therefore, the Company dispute both the right of the party to recover any damages, and the amount claimed, the only course given to them by the statute is, first, to summon the jury; and then, supposing the jury to assess some amount of damage as due, to refuse payment of the sum so assessed, leaving the party to recover it by action. In such an action the claimant would be obliged to aver that he had sustained damage within the meaning of the statute. This averment would be traversed, and so the question of right would be determined. If the Company do not dispute the amount claimed, but only deny the right of compensation at all, there they will of course refuse to summon a jury, and will leave the party to bring his action for the amount claimed; and, in such an action, the right will at once be tried

This being the state of the law, Lord *Cottenham* had to decide, in the case of *The London and North Western Railway Company* v. *Smith*, whether the Company were entitled to any relief in this Court by way of an injunction to restrain the claimant from proceeding to compel them to summon a jury, until he had first established a legal title to something, by shewing that the acts complained of were such as constituted damage or injury within the 68th sect. of the Lands Clauses Act. His Lordship in his judgment,

after remarking, that, under the former state of the law, the mandamus compelled the claimant to establish his title to relief before he put the Company to the necessity of causing a jury to be summoned for assessing its amount, proceeds as follows:—"Then comes an Act of Parliament, which, for the purpose of correcting a supposed evil, creates a much greater one, by preventing the Company from having the means of ascertaining the preliminary question of right before they go to the sheriff's jury to assess the amount. This state of the statute law alone would be quite sufficient to justify the interposition of this Court; because it would not be just to permit a party to be involved in a litigation of this kind, without first ascertaining whether the right claimed does in fact exist. In such a state of circumstances the only remedy is an equity, which applies to all cases where a party is sought to be affected, as this Company would be, by the provisions of the Act in question, and entitles the party aggrieved to come here for an injunction."

This decision of Lord *Cottenham* appeared to me to be a distinct authority in favour of the plaintiffs in the present case, and I granted the injunction accordingly—and I did so without much considering whether or not, if the matter were one untouched by authority, I should have come to the same conclusion. It was the decision of the Lord Chancellor on appeal, and of course I was bound to follow it, in a case where the facts seemed to me to be in principle the same. And in fact I have granted more than one injunction acting on that same authority.

The argument on the present motion has led me to consider more attentively the principles of Lord *Cottenham's* decision; and I must confess, that, with the most profound respect for all which proceeded from that very eminent Judge, I cannot say that I feel convinced by his reasoning. It may be that the alteration introduced into the law, by enabling a party claiming compensation to get rid of the

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mandamus, was an unwise change. Still it was the act of the legislature. A course of proceeding is marked out, whereby a party alleging that he has suffered an infringement of a legal right, is enabled in a particular mode of legal proceeding to obtain legal redress. He cannot get that redress without establishing his title to compensation and the amount of damage he has sustained; and the legislature having pointed out the steps by which he is to arrive at that result, what right has this Court to say to a party affected by no equity whatever, you shall not proceed to assert your legal rights in the mode prescribed by law?

I can discover neither principle nor authority for such interference. It was contended, that the decision might be supported on principles analogous to those on which this Court relieves against penalties. But I do not think that argument can be supported. The ground of relief against a penalty is, that though there is a legal right to the penalty, yet the real meaning of the parties all along was, that the penalty should be a mere security for something else. The sum claimed is claimed not as penalty, but as the real amount of damage sustained. This the Company may dispute, and unless they do so, they admit the amount claimed to be the fair measure of damage, if any damage has been sustained; and though it may seem that the more reasonable course would have been to compel the claimant first to establish his title to some damage, and then to ascertain the amount, yet I cannot think it a due exercise of the powers of this Court to say, that because the legislature has obliged a party to proceed in what appears to us an inconvenient course, therefore, this Court will step in and compel him to proceed differently; such an exercise of authority appears to me to be rather making than administering law.

I have felt warranted in making these remarks on a judgment, to which, as being that of a Court of appeal, I should ordinarily have been bound to defer, in consequence

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of the recent decision of the Lord Chancellor in the case of the *East and West India Docks and Birmingham Railway Company* v. *Gattke* (*a*). In that case, the defendant Gattke made a claim on the Company under the 68th section, for a sum of 480*l.*, as compensation for damage alleged to have been sustained by reason of the dust and dirt, occasioned by the Company, having damaged his goods, and by reason of his customers having been compelled by the obstruction occasioned by the works of the Company to quit the side of the road on which the defendant's shop was situate, and to pass on the opposite side; and also by the Company having stopped up a lane or passage, along which he was entitled to a right of way to the back part of the premises. Gattke having made his claim, and served a notice on the Company calling on them to summon a jury, the Company filed a bill to restrain him from all further proceedings under his notice, on the ground that the case was not one in which, under the 68th section, he was entitled to any compensation at all. Sir *James Wigram*, acting on the authority of Lord *Cottenham's* decision, granted the injunction. But, after much consideration, the Lord Chancellor dissolved it; and that decision of the Lord Chancellor's appears to me to be directly in point in the present case. Here, as in that case, the alleged grievance is personal to the complaining party only, and not extending generally, though with different degrees of intensity, to all her Majesty's subjects, as in the case before Lord *Cottenham*.

It was argued for the Company that the 68th section applies not to damage occasioned by the works having been made, that is to say, by the mere existence of the works, but only to such damage as may have been produced by the works while in progress of execution; and here it was said, the claim was wholly for damage occasioned by the existence of the railway as a completed

(*a*) The preceding case.

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work. I am far from saying this may not be the true construction of the 63rd section, whereas in *Gattke's case* some part of the compensation claimed was for the annoyance produced by the works while in progress. To this argument there appeared to be two answers:—That there is nothing on the face of the notice served on the plaintiffs in this case, which would exclude the defendants from giving evidence of and obtaining compensation for damage occasioned to them during the progress of the works as well as since the completion of the railway; and secondly, (that on which I mainly rely,) that the question, whether under the 68th sect. the defendants are entitled to compensation for damage resulting from the existence of the railway as a complete work, is a purely legal question, to be settled in the ordinary course of legal proceeding without the intervention of this Court. I may add further, that if there were any validity in this distinction, the Lord Chancellor in *Gattke's case* would not have altogether dissolved the injunction, but would have only so modified it, as to make it applicable to so much of the defendant's claim as related to the injury arising from the railway having been made; for there, as in this case, a part at least of the damage for which Gattke sought relief, had been occasioned not by the works while in progress, but by the railway having been completed.

[Mr. *Bethell* objected that this point had not been raised in *Gattke's case.*]

The VICE-CHANCELLOR—I am not able to discover any distinction in principle between this case and *Gattke's;* I shall certainly act on that decision, and dissolve the injunction which I granted before that case had been decided.

I should probably have felt bound to take that course, even if I had not taken the same view of the law as was taken by the Lord Chancellor. But I do so the more

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readily, because I cannot but admit the force of the reasoning by which the Lord Chancellor justified his judgment in that case. If there is any part of that reasoning the weight of which I do not feel, it is the mode in which his Lordship endeavours to distinguish the case before him from that before Lord *Cottenham*. The only distinction pointed out in the judgment is, that in Lord *Cottenham's* case the claimant demanded compensation for what would in a greater or less degree have entitled any one of her Majesty's subjects to make a similar demand; I doubt whether this affords any real distinction in principle. In such a case it may be much more easy to say by anticipation that the claimant must fail in establishing a legal title to damages, than if he were proceeding on a complaint of damage affecting his own property alone. Still what the claimant is asserting is a mere legal right. Surely he is at liberty, if he can, to establish this right by the ordinary course of law. Lord *Cottenham's* decision, it must be observed, does not proceed on the ground that the claimant has no legal right, and so ought not to be allowed to harass the Company by vexatious proceedings.

If that were a principle on which the Court could act, and it had been clear that there was no legal right, then the course adopted for putting the question of right or no right into a train of legal inquiry would have been unnecessary. The decision proceeded on the assumption that there was a legal question to be decided as to the claimant's right to compensation, but this Court took into its own hands the obligation of obtaining the decision of a Court of law on the subject, instead of leaving the claimant to establish it in his own way.

I confess, therefore, that the same reasoning which led the Lord Chancellor to dissolve the injunction in *Gattke's case* must, as I should have thought, led him to a similar decision in *Smith's case*. It is not, however, necessary to discuss this point, for if there be any validity in the only

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distinction pointed out by the Lord Chancellor as existing between the two cases, namely, that the damage complained of in the one case was a public wrong, and in the other a private injury, it is clear that the claim set up in this case ranges itself under the latter head. The damage complained of by the defendants in this case affects the defendants and them only, and so must be governed by the decision of the Lord Chancellor and not by that of Lord *Cottenham.*

On these grounds I am of opinion that this injunction must be dissolved.

Mr. *Willcock,* on behalf of the defendant, asked for his costs of the motion to dissolve the injunction.

The VICE-CHANCELLOR.—I do not think it is a case for giving any costs, because, in the first place, in granting the injunction, I acted as the parties are acting on a decision that was a binding and valid decision at the time. It was argued before me that here they ought not to have obtained that injunction, because they came too late; I think there is nothing in that. I dissolve it simply on the ground, that I think the Lord Chancellor's judgment in substance overrules Lord *Cottenham's;* or if it does not overrule it, the distinction is one which makes this case range under that decided by the present Lord Chancellor, and not under that decided by Lord *Cottenham.*

Mr. *Bethell* then asked whether the injunction was dissolved without costs.

The VICE-CHANCELLOR.—I say nothing about the costs.

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COURT OF EXCHEQUER.

Trinity Term, 1850.

THE ATTORNEY-GENERAL *v.* THE GREAT WESTERN RAILWAY COMPANY.

June 8th.

The Great Western Railway Company, by the 5 & 6 Will. 4, c. cvii. were authorised to take certain toll for the conveyance of passengers, &c. By the 9 & 10 Vict. c. cccxxxvii. and the 9 & 10 Vict. c. cccxxxviii. (which Acts received the Royal Assent on the 3rd August, 1846), the Birmingham and Oxford Junction Railway Company were incorporated, and authorised to receive toll at a rate less than on the Great Western Railway. By these Acts the Great Western Railway Company was empowered to purchase the Birmingham and Oxford Junction Line, provided that no such purchase should take effect until the tolls of the Great Western Railway should have been reduced by Act of Parliament to the same scale as that of the Birmingham and Oxford Junction Railway. By the 9 & 10 Vict. c. cccxv. (which received the Royal Assent on the 3rd of August, 1846), the Birmingham, Wolverhampton and Dudley Railway Company were incorporated, and authorised to receive the same tolls as the Birmingham and Oxford Junction Railway Company. By an agreement dated the 12th November, 1846, the Directors of the Birmingham and Oxford Junction Railway Company and the Directors of the Birmingham, Wolverhampton and Dudley Railway Company agreed to sell to the Great Western Railway Company, and that Company agreed to purchase, both their lines. The 10 & 11 Vict. c. cxlix. empowered the Great Western Company to purchase the Birmingham, Wolverhampton and Dudley Railway; and it was by that Act provided, that the Great Western Railway Company might demand for their own use, or of the Birmingham, Wolverhampton and Dudley Railway Company, a scale of toll much less than that fixed by the 5 & 6 Will. 4, c. cvii., but not precisely the same as that authorised by the 9 & 10 Vict. c. cccxxxvii. and 9 & 10 Vict. c. cccxxxviii. The 10 & 11 Vict. c. ccxxvii. (which received the Royal Assent on the 2nd July, 1846,) authorised the Birmingham, Wolverhampton and Dudley Railway Company to sell their railway to the Great Western Railway Company; and it was thereby enacted, that the reduced scale of tolls therein contained, and which is the same as that contained in the 10 & 11 Vict. c. cxlix. should be deemed and taken to be the reduced scale referred to in the 9 & 10 Vict. c. cccxxxvii.:—*Held*, that until the purchase of one or both of the lines was finally effected, the Great Western Railway Company were entitled to take the toll authorised by the 5 & 6 Will. 4, c. cvii; but that, after the completion of either of the purchases, the scale of tolls to be taken by the Great Western Company, as well on their original line as on the purchased line or lines, must be reduced to the scale fixed by the 10 & 11 Vict. c. ccxxvi. and 10 & 11 Vict. c. cxlix.

IN this case an information in Chancery had been filed by the Attorney-General against the Company for charging, for the conveyance of passengers and goods, rates exceeding those allowed by law. The following case was stated by order of *Wigram*, V. C., for the opinion of this Court:—

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By the 5 & 6 Will. 4, c. cvii. "For making a railway from Bristol to join the London and Birmingham Railway near London, to be called the Great Western Railway, with branches," &c., the subscribers were united into a Company for making such railway, and for the other purposes therein mentioned, and were incorporated by the name and style of the Great Western Railway Company; and the said Act, after enactments enabling the Company to raise the capital for the undertaking, to be divided into shares, and enacting that the respective shareholders should be entitled to receive in proportionable parts, according to the sums by them respectively paid, the net profits and advantages which should arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same should be divided by the authority of the said Act, and providing for the application of the money to be raised thereby, empowered the Company to make the railway and the branch railways therein mentioned, in the line or course therein described, with power to take lands and to treat for the purchase thereof, as therein set forth. (The 163rd, 164th, and 165th (*a*) sections were then set out.) And the

(*a*) Sect. 163. "That all persons shall have free liberty to pass along and upon and to use and employ the said railway, with carriages properly constructed as by this Act directed, upon payment only of such rates and tolls as shall be demanded by the said Company, not exceeding the respective rates or tolls by this Act authorised, and subject to the provisions of this Act, and to the rules and regulations which shall from time to time be made by the said Company, or by the said directors, by virtue of the powers to them respectively by this Act granted."

Sect. 164. "That it shall be lawful for the said Company to demand, receive, and recover, to and for the use and benefit of the said Company, for the tonnage of all articles, matters, and things which shall be conveyed upon or along the said railway, any rates or tolls not exceeding the following:" (Here follows a scale of charges per ton per mile.)

Sect. 165. "That it shall be lawful for the said Company to demand, receive, and recover, to and for the use and benefit of the said Company, for or in respect of passengers, beasts, cattle, and animals conveyed in car-

said Act contained clauses enabling the said Company to provide and charge for locomotive or other propelling power upon the said railway, or any other railway communicating therewith; or to carry passengers, cattle, or goods by means thereof, and to charge for the same the rates therein referred to; and the Act contained regulations for the luggage carried by passengers, and for the carriage of small parcels, and the charges for small distances. (The case then set out section 174 (*a*).)

By another Act, 6 Will. 4, c. xxxviii. intituled "An Act to alter the line of the Great Western Railway, and to amend the Act relating thereto," certain enactments were made and passed, whereby the Great Western Railway Company were authorised to alter and vary the line of their railway in the particulars therein expressed; and such Act contains various clauses and provisions relating thereto.

By another Act, 1 Vict. c. xcii. intituled "An Act to enable the Great Western Railway Company to extend the line of such railway, and for other purposes relating thereto," the said Company were authorised, in the manner and subject to the restrictions and regulations therein provided, to extend the line of the said railway to the basin of the Paddington Canal at Paddington, and to levy certain additional or increased rates and tolls for the passengers and goods conveyed upon or along the said extended line of railway or any part thereof, in lieu of the rates or tolls authorised to be demanded by the said first-recited

riages upon the said railway, any tolls not exceeding the following:" (Here follows a scale of charges per mile.)

(*a*) Sect. 174. "That it shall be lawful for the said Company, from time to time, as they shall think fit, to reduce all or any of the rates or tolls by this Act authorised to be taken, and to take the reduced rates; and afterwards from time to time again to raise the same or any of them, and then to take such higher rates, so that the same respectively shall not at any time exceed the amount by this Act authorised."

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Act, not exceeding the rates or tolls expressed in the now stating Act.

Under the provisions and powers contained in the said Act of Parliament, the Great Western Railway, with such alteration and extension of the line thereof as authorised by the said secondly and thirdly-mentioned Acts, was completed, and has been carried on by the said Great Western Railway Company, from time to time, down to the present time, in respect of the carriage of passengers and goods carried on and over the said Great Western Railway, and the various stages or parts thereof, who have charged and taken from the passengers and other persons using the said railway, rates, tolls, and charges not exceeding those authorised by the said first and thirdly-mentioned Acts.

The Great Western Railway Company, prior to the passing of the next hereinafter-mentioned Act, had, under the authority of Parliament, become the purchasers of the undertaking known as the Oxford and Rugby Railway.

By the 9 & 10 Vict. c. cccxxxvii. which received the Royal Assent on the 3rd of August, 1846, and was intituled "An Act for making a Railway from Birmingham to join the Lines of the proposed Oxford and Rugby, and Oxford, Worcester and Wolverhampton Railways, and to be called The Birmingham and Oxford Junction Railway," after enacting, amongst other things, that in citing that Act it should be sufficient to use the expression "The Birmingham and Oxford Junction Railway Act, 1846," it was enacted:—by sections 64, 65, 66, 67, 68, 69, 70, and 71 (*a*), which were set out in the case.

(*a*) Sect. 64. "That the maximum rate of charge to be made by the Company, for the conveyance of passengers upon the said railway, including the tolls for the use of the railway and of carriages, and for locomotive power, and every other expense incidental to such conveyance, shall not exceed the following sums:" (Here follows a scale of charges.)

Sect. 65. "And with respect to the conveyance of horses, cattle, carriages, and goods, be it enacted, that the maximum rates of charge to be made by the Com-

The several rates, by the last-stated Act authorised to be taken in respect both of passengers and goods, were rates

pany, including the tolls for the use of the railway and wagons or trucks and locomotive power, and every expense incidental to such conveyance, except the loading and unloading of goods, where such service is performed by the Company, shall not exceed the following sums:" (Here follows a scale of charges.)

Sect. 66. "Provided always, and be it enacted, that the restriction as to the charges to be made for passengers shall not extend to any special or extra train that may be required to be run upon the said railway, but shall apply only to the ordinary trains appointed or to be appointed from time to time by the said Company for the conveyance of passengers and goods upon the said railway."

Sect. 67. "Provided further and be it enacted, that nothing herein contained shall be held to prevent the said Company from taking any increased charge, over and above the charges hereinbefore limited, for the conveyance of goods of any description, by agreement with the owners of, or persons in charge of, such goods, either in respect of the conveyance thereof by passenger trains, or by reason of any other special service performed by the said Company in relation thereto."

Sect. 68. "That it shall be lawful for the Company to let on lease the railways hereby authorised to be made, or any part thereof respectively, to the Great Western Railway Company, for such term of years and on such conditions as may be mutually agreed on; and it shall be lawful for the said Great Western Railway Company, with the approbation of three-fifths of the shareholders in such last-mentioned Company present, personally or by proxy, in general meeting specially convened for the purpose, to accept and take such lease."

Sect. 69. "That it shall also be lawful for the Company hereby incorporated, by and with the authority of three-fifths of the votes of the proprietors who may be present, either personally or by proxy, at some general meeting specially convened for the purpose, to sell and transfer to the said Great Western Railway Company, and for such last-mentioned Company, by and with the like authority on the part of the proprietors thereof, to purchase the railways by this Act authorised to be made, or any part thereof, or any share or interest therein, and whether before or after the completion thereof; and on completion of such purchase, (of which completion a transfer or conveyance, duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the Company hereby incorporated, shall be sufficient evidence), the said Great West-

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in most instances below and less than the rates which were authorised to be taken by the Great Western Railway Com-

ern Railway Company may have and hold the said railways, or the part thereof, or the share therein purchased by them, and use, exercise, and enjoy, or participate in the use, exercise, and enjoyment of all or any of the rights, powers, and privileges, conferred by this Act on the Company hereby incorporated in relation thereto; and for such purpose it shall be lawful for the Great Western Railway Company, if they see fit, by and with such authority as aforesaid, to create such additional number of shares in the undertaking of the Great Western Railway, and to borrow upon mortgage such a sum of money as may be necessary for completing such purchase, &c.; and from and after such purchase as aforesaid, if any such shall take place, the railways by this Act authorised to be made, or such of them, or such part or parts thereof respectively as may be so purchased by the said Great Western Railway Company, shall thenceforth be and become amalgamated with, and shall form part of the undertaking belonging to such last-named Company; and from thenceforth all the provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, rules, clauses, matters, and things contained in this Act or the said recited Acts relating to the railways hereby authorised to be made, which may so become amalgamated with the Great Western Railway, shall, with reference to all such railways, works, matters, and things as might have been made or done by the Company hereby incorporated, be applied and applicable to the said Great Western Railway Company, their officers, agents, and servants, in every respect as if the said Great Western Railway Company had been in every case in this Act written or referred to in lieu and stead of the Birmingham and Oxford Junction Railway Company."

Sect. 70. "Provided always and be it enacted, that no lease or sale of the said railway to the Great Western Railway Company under the powers hereinbefore contained shall take effect, unless and until the maximum tolls and charges on the said Great Western Railway shall have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges which the Company hereby incorporated are by this Act empowered to take on the railway hereby authorised. Provided, nevertheless, that if the said railway shall not be purchased or rented by the said Great Western Railway Company, under the provisions hereinbefore contained, it shall be lawful for the said last-mentioned Company to use the railway hereby authorised, on such terms and subject to such regulations, and on payment of such rates and tolls not exceeding the rates and

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pany, in respect both of passengers and goods on the Great Western Railway, under the said hereinbefore-stated Acts relating to the Great Western Railway.

By the 9 & 10 Vict. c. cccxxxviii. intituled "An Act for making a Railway into Birmingham in extension of the proposed Birmingham and Oxford Junction Railway," which also received the Royal Assent on the 3rd of August, 1846, after reciting (among other things) that a bill, being the bill which was passed into law under the title of the said "Birmingham and Oxford Junction Railway Act, 1846," was then pending before Parliament, and that the making of a railway diverging from the proposed line of the Birmingham and Oxford Junction Railway, at or near Adderley-street, in the borough of Birmingham and county of Warwick, and terminating at or near Great Charles-street, in the parish of Birmingham, would be of public advantage; it was thereby enacted (amongst other things), that, in citing that Act, it should be sufficient to use the expression "The Birmingham and Oxford Junction (Birmingham Extension) Railway Act, 1846;" and it was thereby enacted, that the persons therein named, and all other persons and corpora-

tolls by this Act directed, as may be agreed on between the said Companies, or, in the event of difference between them, as may be settled by arbitration, &c."

Sect. 71. "That it shall be lawful for the Company hereby incorporated, and for the said Great Western Railway Company, to make and enter into such contracts or agreements for effecting the purposes aforesaid, or for otherwise working or using the said railways or any part thereof, or for the maintenance and repair thereof or any part thereof, as they the said Companies may respectively deem advisable, and subject to such terms and conditions as may be mutually agreed on between them; and any contract or agreement made before the passing of this Act, for all or any of the purposes aforesaid, by the provisional committee of the Company hereby incorporated and the directors of the said Great Western Railway, with the sanction of any general meeting of the said last-mentioned Company, shall be as valid and binding in every respect as if made subsequently to the passing of this Act, and in conformity with the provisions hereof."

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tions, who had already subscribed or should thereafter subscribe to the undertaking, and their executors, &c., should be united into a Company, for the purpose of making and maintaining such railway, and should be incorporated by the name of "The Birmingham and Oxford Junction Railway Company." (The case then set out sections 35, 36, 37, 38, and 40(*a*).)

(*a*) Sect. 35. "That it shall be lawful for the Company to demand any tolls for the use of the railway, and of the engines and carriages employed by them thereon, not exceeding the tolls which, by the bill relating to the said Birmingham and Oxford Junction Railway, if the same shall pass into a law, may be authorised to be demanded in respect of the use of that railway, and of the engines and carriages employed thereon; and all the provisions of the said bill when passed into a law, with reference to the regulations of such last-mentioned tolls, shall be applicable to the regulation of the tolls by this Act authorised."

Sect. 36. "That it shall be lawful for the Company to let on lease the railway hereby authorised to be made, or any part thereof, to the Great Western Railway Company, for such term of years, and on such conditions, as may be mutually agreed on; and it shall be lawful for the said Great Western Railway Company, with the approbation of three-fifths of the shareholders in such last-mentioned Company present, personally or by proxy, in general meeting specially convened for the purpose, to accept and take such lease."

Sect. 37. "That it shall also be lawful for the Company hereby incorporated, by and with the authority of three-fifths of the votes of the proprietors who may be present, either personally or by proxy, at some general meeting especially convened for the purpose, to sell and transfer to the said Great Western Railway Company, and for such last-mentioned Company, by and with the like authority on the part of the proprietors thereof, to purchase the railway by this Act authorised to be made, or any part thereof, or any share or interest therein, and whether before or after the completion thereof; and on completion of such purchase (of which completion a transfer or conveyance, duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the Company hereby incorporated, shall be sufficient evidence,) the said Great Western Railway Company may have and hold the said railway, or the part thereof, or the share therein purchased by them, and use, exercise, and enjoy, or participate in the use, exercise, and enjoyment of all or any of the rights, powers, and privileges conferred by

By another Act of Parliament of the same session, 9 & 10 Vict. c. cccxv., which also received the Royal Assent on the

this Act on the Company hereby incorporated in relation thereto," &c.; "and from and after such purchase as aforesaid, if any such should take place, the railway by this Act authorised to be made, or such part thereof as may be so purchased by the said Great Western Railway Company, shall thenceforth be and become amalgamated with and shall form part of the undertaking belonging to such last-mentioned Company," &c

Sect. 38. "Provided always and be it enacted, that no lease or sale of the said railway to the Great Western Railway Company, under the powers hereinbefore contained, shall take effect, unless and until the maximum tolls and charges on the said Great Western Railway Company should have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges which the Company hereby incorporated are by this Act empowered to take on the railway hereby authorised," &c.

Sect. 40. "'And whereas the subscribers towards the undertaking hereby authorised are also subscribers towards the said Birmingham and Oxford Junction Railway, and the directors of the railway hereby authorised to be made are also directors of the said Birmingham and Oxford Junction Railway and the Company hereby incorporated, as well as the Company engaged in the promotion of the said Birmingham and Oxford Junction Railway, are willing that the said two undertakings should be united into one;' be it therefore enacted, that if the bill for making the said Birmingham and Oxford Junction Railway shall pass into a law in the present session of Parliament, and a Company be thereby incorporated for carrying such railway into effect, the Company hereby incorporated shall merge in and become united and incorporated with the said Birmingham and Oxford Junction Railway Company, and the several shareholders in the Company hereby incorporated shall be and become shareholders in the Birmingham and Oxford Junction Railway Company, with all such rights and privileges as the other shareholders in that Company, and all the capital by this Act authorised to be raised shall be and become part of the capital of the said Birmingham and Oxford Junction Railway; and all the powers, rights, and privileges by this Act or by the recited Acts conferred on the Company hereby incorporated, shall and may be exercised by the said Birmingham and Oxford Junction Railway Company, in like manner as though the same had been specifically conferred on the said last-mentioned Company; and all provisions in this Act or in the said recited Acts contained or referred to applicable to the Company hereby incorporated, shall

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3rd of August, 1846, and which is known by the title of "The Birmingham, Wolverhampton and Dudley Railway Act, 1846," another Company was incorporated under the name of "The Birmingham, Wolverhampton and Dudley Railway Company," for the purpose of making a railway from Birmingham to Wolverhampton and Dudley, to be called The Birmingham, Wolverhampton and Dudley Railway, with power to take and levy, for the use of the said railway, and in respect of the conveyance of passengers and goods thereon, the rates, tolls, and charges therein set forth; the maximum rates, tolls, and charges thereby authorised being the same as those authorised by The Birmingham and Oxford Junction Railway Act, 1846.

The Birmingham, Wolverhampton and Dudley Act, 1846, did not contain any power of leasing or selling the Birmingham, Wolverhampton and Dudley Railway to the Great Western Railway Company, or any other Company.

By the two before-mentioned Acts incorporating the Birmingham and Oxford Junction Railway Company, the capital of that Company was fixed at 1,000,000*l.*, divided into 50,000 shares of 20*l.* each; and by the said Act incorporating the Birmingham, Wolverhampton and Dudley Railway Company, the capital of such Company was fixed at 700,000*l.*, divided into 35,000 shares of 20*l.* each.

On the 12th November, 1846, an agreement was entered into between the respective directors of the Great Western Railway Company, and the directors of the Birmingham and Oxford Railway Company, and of the Birmingham, Wolverhampton and Dudley Railway Company, for the purchase of the said two lines by the Great Western Railway Company. [The case set out the agreement, which is immaterial to the present question.]

be applicable to the said Birmingham and Oxford Junction Railway Company, in like manner as though such last-mentioned Company had been named or referred to in such provisions in lieu of the Company hereby incorporated."

This agreement was afterwards confirmed by resolutions passed at meetings of the shareholders of the said respective Companies, but, subsequently to such confirmation thereof, was disputed by a majority of the shareholders in the Birmingham and Oxford Junction Railway Company, who alleged that the agreement was not warranted by, or conformable with, the provisions of the said Birmingham and Oxford Junction Railway Acts, and caused proceedings to be instituted in the Court of Chancery for the purpose of preventing the said agreement from being carried into execution, and which proceedings were still pending at the times of the passing of the two several Acts next hereinafter mentioned, and during the progress thereof through Parliament.

By the 10 & 11 Vict. c. cxlix. which received the Royal Assent on the 9th of July, 1847, intituled "An Act for enabling the Birmingham, Wolverhampton and Dudley Railway Company to purchase lands for additional station room at Birmingham, and for authorising the sale of the undertaking of the said Company to the Great Western Railway Company," after reciting, amongst other things, that in citing that Act it should be sufficient to use the expression "The Birmingham, Wolverhampton and Dudley Railway Amendment Act, 1847:" it was by the 13th section enacted, that it should be lawful for the said Great Western Railway Company to demand any tolls for the use of the Great Western Railway, or of the Birmingham, Wolverhampton and Dudley Railway, in respect of passengers, cattle, and goods, not exceeding the sums and charges therein specified and set forth. By the 14th section it was enacted, that the toll which the Great Western Railway Company might demand for the use of engines for propelling the carriages of other parties on the said railways as aforesaid, should not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, in addition to the several other tolls or sums by that Act authorised

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to be taken for the use of the said railways. By the 15th section it was enacted, that the maximum rate of charge to be made by the Great Western Railway Company for the conveyance of passengers along the said railways as aforesaid, including the tolls for the use of the said railways and carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the schedule annexed hereto (*a*), and which in many instances are less, but in no instance more, than the sums authorised to be taken on the like account by the said Birmingham, Wolverhampton and Dudley Railway Act, 1846; and with respect to the conveyance of goods, it was by the said 15th section enacted, that the maximum rates of charge to be made by the Great Western Railway Company for the conveyance thereof along the said railways as aforesaid, including the tolls for the use of the said railways and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services, or any of them, were or was performed by the said Company, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the schedule annexed hereto (*b*), and which also in many instances are less, and in no instance more, than the sums authorised to be taken on the like account by the said Birmingham, Wolverhampton and Dudley Railway Act, 1846. (The case then set out sections 16, 17, 22, 23, 24, 25, and 28 (*c*).)

(*a*) Post, p. 422.

(*b*) Ibid.

(*c*) Sect. 16. "That where any such articles, matters, or

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By the 10 & 11 Vict. c. ccxxvi. which received the Royal Assent on the 22nd of July, 1847, and was intituled "An

things should be carried a distance exceeding fifteen miles or fifty miles respectively, as thereinbefore provided, the Great Western Railway Company are hereby empowered to demand and receive, at the least, the rates, tolls, or charges, hereinbefore specified, as for fifteen miles or fifty miles respectively."

Sect. 17. "That certain provisions and regulations therein expressed, in respect of passengers and goods conveyed on the said railways for short distances, and in respect of fractional distances and weights, shall be applicable to the fixing of all the tolls and charges under the Act authorised; and with respect to small packages and single articles of great weight, it is enacted, that, notwithstanding the rate of tolls provided by the said Act, the Company might lawfully demand the tolls therein mentioned."

Sect. 22. "Provided always and be it enacted, that nothing herein contained shall be held to prevent the said Company from taking any increased charge, over and above the charges hereinbefore limited, for the conveyance of goods of any description, by agreement with the owners of or persons in charge of such goods, either in respect of the conveyance thereof by passenger or other trains, or by reason of any other special service peformed by the said Company in relation thereto."

Sect. 23. "Provided also and be it enacted, that the restriction as to the charges to be made for passengers shall not extend to any special or extra trains that may be required upon the said railways, but shall apply only to the ordinary trains appointed or to be appointed, from time to time, by the said Company, for the conveyance of passengers and goods upon the said railways."

Sect. 24. "'And whereas, by certain articles of agreement, bearing date the 12th day of November, 1846, and entered into between the directors of the Great Western Railway Company, the directors of the Birmingham and Oxford Junction Railway Company, and the directors of the Company incorporated by the recited Act, and which agreement has been approved of and confirmed by the shareholders in the last-mentioned Company, and also by the shareholders in the Great Western Railway Company present at meetings of those Companies respectively specially convened for the purpose, it has been agreed that the undertaking authorised by the recited Act, as well as the further works which may be authorised by this Act, shall be sold and transferred to the Great Western Railway Company, on the terms and conditions mentioned in the said agreement;' be it therefore enacted, that it shall be lawful for the Company to

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Act for making branch railways from the Great Western Railway to Henby and to Radstock, to widen certain por-

sell and transfer to the Great Western Railway Company, and for such last-mentioned Company to purchase, the undertaking authorised by the recited Act and by this Act; and on the completion of such purchase (of which completion a transfer or conveyance duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the Birmingham, Wolverhampton and Dudley Railway Company, shall be sufficient evidence,) the Great Western Railway Company may have and hold the said undertaking, and may use, exercise, and enjoy all the rights, powers, and privileges conferred by the recited Act and by this Act on the Birmingham, Wolverhampton and Dudley Railway Company in relation thereto; and from and after such purchase all the provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, rules, clauses, matters, and things contained in this Act or the recited Act relating to the undertaking shall, with reference to all such railways, works, matters, and things as might have been constructed, maintained, used, made, or done by the said Birmingham, Wolverhampton and Dudley Railway Company, be applied and applicable to the Great Western Railway Company, their officers, agents, and servants, in every respect as if the Great Western Railway Company had been in every case in this Act and in the recited Act written or referred to in lieu and stead of the Birmingham, Wolverhampton and Dudley Railway Company."

Sect. 25. "Provided always, and be it enacted, that it shall not be lawful for the said Birmingham, Wolverhampton and Dudley Railway Company, by virtue of the powers hereinbefore contained, to transfer, nor for the said Great Western Railway Company to accept the transfer of the said undertaking, unless it shall have been proved to the satisfaction of the Commissioners of Railways, and certified by them under their seal, previously to the completion of such sale by transfer, that one-half of the whole amount of the capital, exclusive of loans by the Act or Acts relating to each of the said Companies authorised to be raised, has been actually paid up and expended for the purposes authorised by such Act or Acts respectively."

Sect. 28. "That it shall be lawful for the Birmingham, Wolverhampton and Dudley Railway Company and for the Great Western Railway Company, to make and enter into any contracts or agreements relating to the sale of the said undertaking to the last-mentioned Company, or for otherwise working or

tions of the Great Western Railway, to enable the Great Western Railway Company to purchase or amalgamate with the Birmingham, Wolverhampton and Dudley Railway Company, and to purchase the Wycombe and Great Western Uxbridge Railways, and for other purposes," it was enacted, that, in citing that Act, it should be sufficient to use the expression, 'The Great Western Railway Amendment and Extension Act, 1847.'" And it was further enacted, that all the provisions, matters, and things contained in the said several Acts relating to the Great Western Railway Company, so far as the same were unrepealed and in force, and were not inconsistent with or altered by the provisions of that Act, and save in so far as the same might be inconsistent with the provisions of the Lands Clauses Consolidation Act, 1845, and of the Railways Clauses Consolidation Act, 1845, should extend to that Act, and to the several purposes thereof, as fully and effectually as if the same provisions, matters, and things were repeated and re-enacted in that Act, and had specific reference thereto. (The case then set out sections 40, 41, 47, 48 (*a*).)—By the 49th section

using the said undertaking or any part thereof, for the maintenance and repair thereof or any part thereof, as the said Companies may respectively deem advisable, and subject to such terms and conditions as may be mutually agreed on between them; and the said articles of agreement for sale of the said railway hereinbefore referred to, shall be as valid and binding, in every respect, as if the same had been made subsequently to the passing of this Act, and in conformity with the provisions thereof."

(*a*) Sect. 40. "'And whereas an Act was passed in the last session of Parliament, called 'The Birmingham, Wolverhampton and Dudley Railway Act, 1846:' and whereas, by certain articles of agreement, bearing date the 12th day of November, 1846, and entered into between the directors of the Great Western Railway Company and the directors of the said Birmingham, Wolverhampton and Dudley Railway Company, and of the Birmingham and Oxford Junction Railway Company, and which agreement has been confirmed by the proprietors in the said three Companies respectively, at meetings specially convened for the purpose, it has been agreed, amongst other objects, and subject to the approval of Parliament, that the Great Western

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it was enacted, that the maximum rate of charge to be made by the Company for the conveyance of passengers

Railway Company shall be the purchasers of the undertaking authorised to be carried into effect by the said Birmingham, Wolverhampton and Dudley Railway Company;' be it therefore enacted, that it shall be lawful for the Great Western Railway Company to purchase the said undertaking, as well as any works which the Birmingham, Wolverhampton and Dudley Railway Company may be authorised to carry into effect, or any undertaking which they may be authorised to purchase by any Act or Acts which may be passed in the present session of Parliament, together with all their rights, powers, privileges, and authorities in relation thereto; and it shall be lawful for the Great Western Railway Company to purchase, hold, use, exercise, and enjoy the same; and the agreement so entered into as aforesaid shall be binding on the Great Western, and the Birmingham, Wolverhampton and Dudley Railway Companies respectively."

Sect. 41. "That it shall be lawful for the Birmingham, Wolverhampton and Dudley Railway Company, and they are hereby required, on demand made by the Great Western Railway Company, and on payment or tender by them of the price or consideration specified in the said articles of agreement, at the time and in manner therein mentioned, to transfer to the Great Western Railway Company the undertaking which they are by the said recited Act authorised to carry into effect, or which they may be authorised to carry into effect by any Act or Acts which may be passed in the present session of Parliament, and on completion of such transfer (of which completion a deed of transfer or conveyance, duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the said Birmingham, Wolverhampton and Dudley Railway Company, shall be sufficient evidence,) the Great Western Railway Company may have and hold the undertaking so transferred to them, and may use, exercise, and enjoy all the powers and privileges which the said Birmingham, Wolverhampton, and Dudley Railway Company are or may be authorised or empowered to use, exercise, or enjoy in relation thereto."

Sect. 47. "'And whereas two Acts were passed in the last session of Parliament, intituled respectively 'The Birmingham and Oxford Junction Railway Act, 1846,' and 'The Birmingham and Oxford Junction (Birmingham Extension) Railway Act, 1846;' by which Acts it was enacted that no lease or sale of such last-mentioned railways to the Great Western Railway Company, under the powers in the said Acts contained, should take effect unless and until the maximum tolls and charges on

along the said railway, including the tolls for the use of the said railways and of carriages, and for locomotive

the said Great Western Railway should have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges authorised to be taken by the last-mentioned Act; and whereas a bill is now pending before Parliament for uniting the Birmingham and Oxford Junction Railway Company, and the Birmingham, Wolverhampton and Dudley Railway Company into one Company, and, amongst other objects, for authorising the sale of the said Birmingham, Wolverhampton, and Dudley Railway, and other new works to the Great Western Railway Company, by which bill it is also provided, that the sale of the said Birmingham, Wolverhampton, and Dudley, Railway to the Great Western Railway Company shall not take effect until the maximum tolls and charges on the said Great Western Railway have been reduced by Parliament in manner aforesaid; and whereas it is expedient that the tolls and charges on the said Great Western Railway should be reduced, in order that the purchase of the said railways by the said Great Western Railway Company should take effect;' "Be it therefore enacted, that the scale of tolls and charges by this Act authorised to be demanded and taken on the said Great Western Railway, shall be and be deemed and held to be the reduced scale referred to in the said Acts relating to the said Birmingham and Oxford Junction Railway, and in the said recited bill relating to the amalgamation of the said Birmingham and Oxford, and Birmingham, Wolverhampton, and Dudley Railway Companies, on the establishment whereof by Parliament the sale of the said undertakings respectively to the said Great Western Railway Company might lawfully take effect, and that from and after the transfer of the said undertakings, or any part thereof, to the said Great Western Railway Company, it shall not be lawful for the Great Western Railway Company to demand and receive, in respect of the use of the Great Western Railway and the Branch Railways by this Act authorised to be made, by parties using the same, either with their own carriages and engines employed by them thereon, or with their own engines only (in cases where the Company as hereinafter provided may consent to supply carriages), any tolls and charges exceeding the tolls and charges following:" (Then follows a scale of tolls, &c.)

Sect. 48 "That the toll which the Company may demand for the use of engines for propelling the carriages of other parties on the said railways shall not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, in addition to the several other tolls

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power, and every other expense incidental to such conveyance as aforesaid, except Government duty, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the said schedule annexed hereto (*a*).—And with respect to the conveyance of goods, the maximum rates of charge to be made by the Company for the conveyance thereof along the said railways, including the tolls for the use of the said railways and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them were or was performed by the Company, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the said schedule annexed hereto (*b*).

The bill in the last-mentioned Act stated to be pending before Parliament, for uniting the Birmingham and Oxford Junction Railway Company, and the Birmingham, Wolverhampton and Dudley Railway Company into one Company, and other objects, and for authorising the sale of the Birmingham, Wolverhampton and Dudley Railway, and other new works, to the Great Western Railway Company, did not pass into a law. [The case then set out the 11 & 12 Vict. c. lxxiv. "The Great Western Railway, Berks, and Hants Extension Act, 1848," ss. 24, 25, 26, 30; the 11 & 12 Vict. c. cxxxv. "The Great Western Railway (Slough and Windsor) Act, 1848," ss. 38, 39, 40; and the 11 & 12 Vict. c. clix. "An Act to confer additional powers on the Great Western Railway Company with reference to an agreement of the 12th November, 1846, for the purchase by them of the Birmingham and Oxford Junction, and

or sums by this Act authorised to be taken for the use of the said railways."

(*a*) See post, p. 422.

(*b*) See post, p. 422.

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Birmingham, Wolverhampton and Dudley Railways," ss. 1, 2, 3, 4, 5, 10, 14, 18. It is unnecessary to state these, as the judgment of the Court did not proceed upon them.]

The sale to the Great Western Railway Company of the Birmingham and Oxford Junction Railway, or of the Birmingham, Wolverhampton and Dudley Railway, mentioned or referred to in the 47th section of "The Great Western Railway Amendment and Extension Act, 1847," has not yet been completed; nor have nor has the said two last-mentioned undertakings, or either of them, or any part thereof respectively, been transferred to the Great Western Railway Company or completed and opened to the public; nor has any portion of the purchase-money for the same been paid; nor has one-half of the whole amount of the capital mentioned or referred to in the 25th sect. of "The Birmingham, Wolverhampton and Dudley Railway Amendment Act, 1847," exclusive of the loans in the same section respectively mentioned or referred to, been paid up or expended for the purposes authorised by the Act or Acts in the same section mentioned or referred to; nor has any certificate of such payment or expenditure been given by the Commissioners of Railways; nor has one-half of the whole amount of the capital, exclusive of loans authorised to be raised by the Act or Acts relating to the Great Western Railway Company and the Birmingham, Wolverhampton and Dudley Railway Company, been paid up or expended for the purposes mentioned or referred to in the 46th sect. of the Great Western Railway Amendment and Extensions Act, 1847, nor has any certificate of such last-mentioned payment or expenditure been given by the Commissioners of Railways; and the Great Western Railway Company have not at the present time in their hands monies sufficient for the completion of the purchase, either of the Birmingham and Oxford Junction Railway, or of the Birmingham, Wolverhampton and Dudley Railway; and such monies will have to be

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raised and provided either by the creation of new shares or by the taking up of money on loan.

Ever since the passing of the Acts respectively intituled "The Birmingham, Wolverhampton and Dudley Railway Amendment Act, 1847," and "The Great Western Railway Amendment and Extensions Act, 1847," the Great Western Railway Company have continued to charge and receive, and they do now charge and receive, for the conveyance of passengers and goods along the said Great Western Railway, rates of charges exceeding the said rates mentioned and set forth in the schedule hereto annexed (*a*), but not ex-

(*a*) The following is the schedule:—"For the conveyance of passengers along the said railways as aforesaid, including the tolls for the use of the said railways and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except Government duty, shall not exceed the following sums: (that is to say)—

"For every passenger conveyed in a first-class carriage by an express train, the sum of 2½*d.* per mile.

"For every passenger conveyed in a second-class carriage by any express train, the sum of 1¾*d.* per mile.

"For every passenger conveyed in a first-class carriage by any other train, the sum of 2*d.* per mile.

"For every passenger conveyed in a second-class carriage by any such other train, the sum of 1½*d.* per mile.

"For every passenger conveyed in a third-class carriage by any such other train, the sum of 1*d.* per mile.

"And with respect to the conveyance of goods, the maximum rates of charge to be made by the Company for the conveyance thereof along the said railways, including the tolls for the use of the said railways and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the same Company, shall not exceed the following sums: (that is to say)

"For every horse, mule, and other beast of draught or burden, 3*d.* per mile.

"For horned cattle, the sum of 1¾*d.* per head per mile.

"For calves, pigs, sheep, and small animals, ½*d.* each per mile.

"For every private carriage, 4*d.* per mile.

"For all coal, coke, ironstone, and other articles hereinbefore

ceeding the rates authorised to be taken under the three firstly-mentioned Acts.

The question for the opinion of the Court is, whether the Great Western Railway Company are entitled by law to charge and receive, for the conveyance of passengers and goods along the said Great Western Railway, any rates of charge exceeding the rates mentioned and set forth in the schedule hereunder written, save in respect of passengers and goods conveyed on the Great Western Railway for short distances, or by special or extra trains, or in respect of fractional distances or weights, or the carriage of small packages, or articles of great weight, or in cases of special agreement.

classed therewith, conveyed any distance not exceeding fifty miles, the sum of $1\frac{1}{8}d.$ per ton per mile; and the sum of $\frac{1}{8}d.$ per ton per mile, for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"For all dung, compost, and other articles hereinbefore classed therewith, conveyed any distance not exceeding fifteen miles, the sum of $1\frac{1}{2}d.$ per ton per mile; and the sum of $1\frac{1}{8}d.$ per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifteen miles.

"For all sugar, grain, and other articles hereinbefore classified therewith, conveyed any distance not exceeding fifty miles, the sum of $2\frac{1}{2}d.$ per ton per mile; and the sum of $2d.$ per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"For all cotton and other articles hereinbefore classified therewith, conveyed any distance not exceeding fifty miles, the sum of $3d.$ per ton per mile; and the sum of $2\frac{1}{2}d.$ per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"For fish and all other wares, merchandise, articles, matters, and things, conveyed any distance not exceeding fifty miles, the sum of $3\frac{1}{2}d.$ per ton per mile; and the sum of $3d.$ per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"Where any such articles, matters, or things, are carried a distance exceeding fifteen or fifty miles respectively, as above provided, the Company are empowered to demand and receive, at the least, the rates of charge above specified, as for fifteen or fifty miles respectively."

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The *Attorney-General* (Sir *J. Jervis*), with whom was *Welsby*, for the Crown.

Peacock, with whom was *F. Stevens*, for the defendants.

The *Attorney-General* replied.

[The arguments are omitted, as the substance of them is contained in the judgment of the Court.]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a case for the purpose of deciding whether the Great Western Railway Company are bound to reduce their tolls on the main line to the scale fixed by the Act of Parliament for the Birmingham and Oxford Junction Railway.

By the original Great Western Railway Act, 5 & 6 Will. 4, c. cvii. ss. 164, 167, and by 6 & 7 Will. 4, c. xxxviii. and 1 Vict. c. xcii. the Company are authorised to take certain tolls. The Company have ever since taken and still take the tolls authorised by those Acts. The question is, whether any statute that has since passed prevents them from continuing to do so.

By two Acts which received the Royal Assent on the 3rd of August, 1846, that is, the 9 & 10 Vict. c. cccxxxvii. and the 9 & 10 Vict. c. cccxxxviii. a new Company was created, called "The Birmingham and Oxford Junction Railway Company," and the tolls authorised by those Acts were less than those of the Great Western Railway Company. By those Acts power was given to the Great Western Railway Company to purchase the Birmingham and Oxford Junction line (see ss. 69 and 70, of the former Act, and ss. 37 and 38, of the latter), provided that no such sale should take effect unless and until the tolls on the Great Western line shall have been reduced by Act of Parliament to the same scale as that of the Birmingham and Oxford Junction Railway. On the same 3rd of August, 1846, another Act received the Royal Assent, 9 & 10

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Vict. c. cccxv. called "The Birmingham, Wolverhampton and Dudley Railway Act," whereby a new Company was formed for making a railway from Birmingham through Wolverhampton to Dudley, and that Company was authorised to receive the same tolls as were to be taken by the Birmingham and Oxford Railway Company. This Act contained no power of sale to the Great Western Railway. By articles of agreement, dated the 12th of November, 1846, entered into by the directors of the Great Western Railway Company, the directors of the Birmingham and Oxford Railway Company, and the directors of the Birmingham, Wolverhampton and Dudley Railway Company, the two latter sets of directors agreed to sell to the Great Western Railway Company, and the Great Western Railway Company agreed to purchase, the Birmingham and Oxford line, and the Birmingham, Wolverhampton and Dudley line, upon certain terms specified in the agreement.

It must be observed, that this contract, so far as relates to the Birmingham and Oxford line, had been authorised by the 9 & 10 Vict. c. cccxxxii.; but as to the Birmingham, Wolverhampton and Dudley Railway there was not, at the date of the contract, any parliamentary authority to make it. This authority, however, was given by an Act passed in the next session, 10 & 11 Vict. c. cxlix. called "The Birmingham, Wolverhampton and Dudley Amendment Act." By section 24, the contract of the 12th of November, 1846, is there recited, and power is given to the Great Western Railway Company, and the Birmingham, Wolverhampton and Dudley Railway Company, to carry it into effect; but by section 25, no sale to the Great Western Railway Company is to be made, until a certificate has been obtained from the Railway Commissioners, that one-half of the capital has been duly paid up. By this Act it is provided (sections 13, 14, and 15) that the Great Western Railway Company may demand for the use of the Great Western Railway Company, or of the Birmingham, Wolverhampton and Dudley

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Railway, the tolls therein enumerated, being a scale of tolls materially less than those of the original Great Western Railway Acts, but not precisely the same as those contained in the Birmingham and Oxford Acts. By section 15, certain sums are fixed as the maximum to be taken by the Great Western Railway Company, for the conveyance of passengers, cattle, and goods along the said railways, that is, along the Great Western Railway, and the Birmingham, Wolverhampton and Dudley Railway.

The only other Act to which it appears to us material to refer is the 10 & 11 Vict. c. ccxxvi., which received the Royal Assent on the 2nd of July, 1847. That was an Act for enabling the Great Western Company to make certain branch lines, and to purchase the Birmingham, Wolverhampton and Dudley Railway, and for other purposes; and by section 41 the last-named Company are again authorised to sell their railway to the Great Western Company, and, on tender to them by the Great Western Company of the purchase-money, are required to execute a proper conveyance; and by section 47, it is enacted (inter alia) that the reduced scale of tolls therein contained (and which is precisely the same as that contained in the Act of the same session, 10 & 11 Vict. c. cxlix. being the Birmingham, Wolverhampton and Dudley Act), should be deemed and taken to be the reduced scale referred to in the Birmingham and Oxford Junction Act, the 9 & 10 Vict. c. cccxxxvii.

The result of these Acts is, that, by the 9 & 10 Vict. c. cccxxxvii. the Great Western Railway Company were empowered to purchase the Birmingham and Oxford line, their own tolls on the Great Western line being first reduced by Act of Parliament to a scale not exceeding that of the Oxford line. By the 10 & 11 Vict. c. cxlix. the Great Western Railway Company were empowered to purchase the Birmingham, Wolverhampton and Dudley line, and to take on that line and their own original line a reduced scale of tolls not precisely the same as that of the Birmingham and

Oxford scale; and there was in that Act, as in other Acts, a maximum clause, that is, a clause limiting the sum which the Company could take for the railway, and for the supply of locomotive power, and the use of carriages, and so on.

The *Attorney-General* contended, that immediately after the passing of this Act, the Great Western Railway Company were precluded from taking on their own line more than the reduced toll. But we are clearly of opinion, that this is not the true construction of the Act. The reduction of toll was clearly only to take effect when the purchase of the Birmingham, Wolverhampton and Dudley line was completed. Under any other construction, the Great Western Railway Company would be at liberty to take tolls on the Birmingham, Wolverhampton and Dudley Railway before it belonged to them, and while the Birmingham, Wolverhampton and Dudley Railway Company might be themselves using and taking tolls on it for their own purposes; which appears to us a manifest absurdity. Then follows the 10 & 11 Vict. c. ccxxvi. which substitutes the scale provided by the 10 & 11 Vict. c. cxlix. for the Birmingham and Oxford scale, making the scale to be taken on completing of both lines, that is, the Birmingham and Oxford line, and the Birmingham, Wolverhampton and Dudley line, the same; so that when either of the purchases shall have been finally effected, the scale of tolls to be taken by the Great Western Railway Company, as well on their original as on the purchased line or lines, will be the reduced scale; but until the purchase of one or both of the lines has been effected, the right of the Great Western Railway Company to take the tolls authorised by their original Act remains unaffected. Our certificate will, therefore, be for the defendants.

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Hilary Term, 1851.

Nov. 16*th.*
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Jan. 22*nd.*

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By a local Act for regulating the poor of Southampton, it was enacted, that every person "who shall let out his house in separate apartments or ready furnished to lodgers, or shall so let tenements built on ground appurtenant to his principal dwelling, shall, for the purposes of this Act, be deemed to be the occupier thereof." The Company were the owners, but not the occupiers, of the custom-house, a manufactory, and workshops:—*Held*, that this enactment did not apply to such premises, though they were within the general outer inclosure of the Company's premises.

A RULE had been obtained, calling upon the overseers of the poor of Southampton, to shew cause why a rate for the relief of the poor within the town and county of Southampton, dated the 8th January, 1849, should not be amended by reducing the assessment made upon the Southampton Dock Company. On an appeal at the April Quarter Sessions, 1849, for the town and county of Southampton, against the said rate, by which the Southampton Dock Company was rated in the entire sum of 4071*l.* net estimated rental or rateable value, in respect of those docks and various

It was provided by sect. 188 of the Company's Act, that they might build or provide, out of their income, steam-tugs, for the purpose of towing any vessels into or out of the Docks, from or to Southampton, or any part of the British Channel. They employed for that purpose a steam-tug, "which offered considerable advantage to those who used the docks, and might be fairly considered as an useful appendage to the docks, and conducive to the general profits of the concern, although it was not indispensably necessary, as the duty might have been done by hiring other steam-boats on each occasion, but at less advantage and convenience both to the Company and the public using the docks:"—*Held*, that the steam-tug must be taken as ancillary to the docks, and part of the floating capital used in carrying on the concern, and that, in estimating the amount of the assessment of the Company to the poor-rate, the expense of it was properly deducted.

A sum of 1000*l.* had been allowed to the directors as a reasonable remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the Company in managing the affairs of the docks, independently of the profit on the capital employed:—*Held*, that regard being had to the nature of the concern, this allowance might be deducted, though the directors had declined to receive any remuneration for the last year before the assessment.

Cranes, steam-engines, and other like ponderous machinery, though attached to the freehold, were capable of being detached with as little injury to it as other fixtures put up for the purposes of trade, and usually valued as between incoming and outgoing tenants:—*Held*, that these ought not to be treated as stock-in-trade, and that no deduction ought to be made in respect of them.

Income-tax is not a tax upon the subject-matter rated, which a tenant, as such, would be obliged to pay; and, therefore, no deduction ought to be made in respect of it.

buildings, warehouses, stores, workshops, steam-engines, waterworks, machinery, yards, and buildings belonging to the said Company, the Recorder reduced the amount of the rate upon the Company to 3750*l.*, subject to the opinion of this Court on the following case:—

The Southampton Dock Company was incorporated by stat. 6 Will. 4, c. xxix. amended by 1 & 2 Vict. c. lxii. 6 & 7 Vict. c. lxv. and 8 & 9 Vict. c. xxiii. and under the provisions and restrictions of these statutes (copies of which are to be referred to as part of this case) the Company proceeded to make the docks and premises included in the rate, and to take toll &c.; and the business of the docks is now carried on under these Acts. In the assessment on the Company, certain parts of the above premises belonging to the Company, but exclusively used and occupied by other persons, were included; and as to these, the Court of Quarter Sessions adjudged that the Dock Company was not rateable in respect of them, but only for the docks and other premises occupied by the Company. The following are the particulars of the premises so used and occupied by other persons—that is to say, the custom-house, with the appurtenances, leased to and in the occupation of her Majesty's Commissioners of Customs, at the rent of 500*l.* 10*s.*; a manufactory, rented and occupied by the West India Mail-packet Company, at the rent of 440*l.*; sundry workshops, in the occupation of J. White, at the annual rent of 75*l.* All these premises, except the custom-house, are within the general outer inclosure of the Dock Company's premises. The custom-house itself is built on the land taken by the Dock Company under the powers of one of the above-mentioned Acts, but it is without the inclosure. The customs watch-house is within the inclosure, and both are let at an entire rent to the Commissioners of Customs. It was proved that the Dock Company had demanded from the West India Mail-packet Company the poor rates due in respect of that portion of the dock premises so occupied by them,

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and it was contended by the respondents, that the Dock Company was rateable for all the above premises; and they referred to the following clauses of a local Act, 13 Geo. 3, c. l., being "An Act for the better regulating the Poor, and repairing the Highways within the Town and County of the Town of Southampton," (a copy of which Act is to be referred to as part of this case). Section 25 of this Act, after reciting that divers houses are let out as separate apartments and distinct tenements, and others are let ready furnished, and that divers persons have let tenements, built on ground appurtenant to their principal dwelling, to strangers and others unable to pay rates or improper to be rated, whereby the payment of rates may be evaded &c., provides that every person, whether landlord or tenant, who shall let out his house in separate apartments or ready furnished to lodgers, or who shall have let any such buildings as aforesaid, shall, for the purposes of that Act, be deemed to be the occupier thereof, and such landlord or tenant, or any or either of them, at the discretion of the said guardians, may be rated accordingly, and shall be liable and subject to the payment of the sum so assessed. And by the 26th section of the same Act, the goods and chattels of every person renting or enjoying any such separate apartment in such house, or renting or occupying any such ready furnished, or any such tenements, are liable to be distrained for payment of the said rate; and the amount so paid or levied may be deducted out of the next rent due to the landlord. As to the residue of the property in the occupation of the appellants, their revenues are derived under the provisions of their Acts from tonnage dues, rates on exports and imports, warehouse and wharfage rents, payments for using graving or dry docks, and tolls paid by passengers landing or embarking at the docks; and all these payments accrue either in respect of the use of the Company's premises, or for work done by the Company's servants and workmen for those who use them. Both parties agreed as to the principle of

rating—that is to say, that the net annual receipts of the Company should be taken, without allowing interest on the original outlay in forming the docks, or on subsequent loans for the enlargement and completion of them; and after deducting therefrom interest on the capital necessary for carrying on the business of the Company, tenant's profits, the taxes, and the estimated annual expenses of repairs and renovations, that the residue was the rateable value. The difference between the parties arose on some of the items of disbursement and deduction claimed by the appellants. The following is the short statement of receipts and deductions as allowed by the Court:—

The gross receipts for the year, and exclusive of the rent of the premises rateable separately		£20,600
Disbursements during the same year, including expenses of a steam-tug, direction, insurance, local rates, &c.		10,300
Net receipts		£10,300
Further deductions, claimed and allowed, were —capital necessary for carrying on the Company's business—that is to say, moveable plant	£6900	
Coals in store, materials, and cash balance....	8100	
Total amount of capital.....	£15,000	
On which last amount the Court allowed, under the special circumstances of the case, 5*l.* per cent. interest, and 20*l.* per cent. for tenants' and trade profits	3,750	
Estimated annual expense of repair and renovation of moveable plant	845	
Estimated annual expense of repair and renovation of fixtures, or fixed plant, described hereafter.....	390	
Annual repair and maintenance of the freehold premises occupied by the Company, exclusive of the above fixtures.....	1,565	
Total deductions.....		£6,550
Net rateable value in the hands of a tenant		£3,750

To which last amount the rate was reduced by the Court.

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The respondents objected to any deduction for disbursements in respect of the items of steam-tug and direction. As to the steam-tug, for the expenses of which the Court allowed 778*l.*, it appeared that one had been and was actually in use by the Dock Company for the purposes of the docks; and the Company are empowered by the 188th section of the Dock Act to build or provide, out of the income of the Company, steam-tugs for the purpose of towing any vessels into or out of the docks, from or to Southampton, or to any part of the British Channel. The steam-tug offers considerable advantages to those who use the docks, and may be fairly considered as an useful appendage to the docks, and conducive to the general profits of the concern. It was not indispensably necessary, inasmuch as the duty might have been done by hiring other steam-boats at Southampton for each occasion, but at less advantage and convenience both to the Company and the public using the docks. The value of such a tug is to be taken at 2500*l.*, and is included in the estimated value of the moveable plant hereinbefore mentioned. The actual receipts or earnings of it for the year are included in the above statement of the general receipts of the Company, and amounted to 616*l.* As to direction, this was a sum of 1000*l.* heretofore paid to the directors under the Dock Act, as a personal remuneration for managing the business of the Company. The dividends of the Company being small, the directors had, in fact, waived and declined to receive any remuneration for the last year before the assessment. The sum was allowed by the sessions as a reasonable remuneration for the personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the Company in managing the affairs of the docks, independently of the profit on capital embarked by him. In addition to the deductions allowed by the Court, the appellants claimed two further deductions: they contended that certain fixtures, or fixed plant, consisting of cranes, steam-engines, shears, derricks, dolphins, and other like ponderous machinery attached to the freehold, and

essential to the business of the Company, should be taken into account in estimating the rent, as fixtures for which a tenant would be required to pay on taking possession of the premises, and ought to be treated as personal stock in the nature of stock in trade, and part of the capital which a tenant would have to invest in the business; that, if so considered, such fixtures would diminish instead of increase the rateable value of the property of the Company. The fair value of the fixtures, if purchased by an incoming tenant, would be 6550*l.*; and the sessions find as a fact, that the fixtures in question were attached to the freehold, but are capable of being detached from the freehold as easily, and with as little injury to it, as other fixtures put up for the purposes of the trade or business of the tenant, and usually valued as between incoming and outgoing tenants. If those fixtures ought to be regarded as stock in trade or personal stock, then the appellants are entitled to the same deduction in respect of interest and tenant's profit as on the sum of 15,000*l.* above mentioned. The appellants further claimed to deduct 155*l.* per annum for income-tax, and they claimed this deduction, not in respect of the amount of the tax actually paid by them as owners of the premises, but in respect of the estimated profit or income of the supposed tenant of the Dock Company, contending that the tax would operate to diminish the rent which a tenant would agree to pay. The sessions held, that the tax, being on the income of the lessee over and above the rent paid for the premises by which his profits are earned, could not affect the rent, and disallowed the deduction. The respondents did not object to the amount of this deduction, if allowed at all, and no point was raised on the effect of the payment of the tax by the Company, under Schedule (A.) of the Income-tax Act. The points in difference between the parties, submitted to the judgment of this Court, are, therefore, as follow:—On the part of the respondents—first, that the Dock Company was properly assessed for the premises hereinbefore described as

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occupied by other parties; secondly, that the expenses of the steam-tug ought not to have been allowed; thirdly, that the deduction under the head of direction ought not to have been allowed. On the part of the appellants—first, that the fixtures or fixed plant of the Company, as above described, ought to have been considered as capital or stock in trade; secondly, that the income-tax on the tenant's income or profit ought to have been deducted. The rate, as amended by the sessions, is to be raised, or further reduced, amended, confirmed, or referred back to the sessions, as this Court shall think fit.

M. D. Hill and *Massey* shewed cause.—With respect to the deduction for the expenses of the steam-tug, that ought not to be allowed; the employment is collateral to the business of the Company, and is not necessary to the enjoyment of the docks. The business of the docks might be carried on without it. [Lord *Campbell*.—If it is impossible to bring in vessels without the aid of a steam-tug, then it becomes ancillary to the business of the docks, and in that case the expense of it ought, as it seems to me, to be deducted.] But that is not to be inferred from the case. If the occupiers of the docks carried on business as carriers, their gains thereby could not affect the rateable value of their premises. [Lord *Campbell*.—A tenant, in renting the docks, would no doubt take into account the receipts and disbursements of the steam-tug.] They cited on this point, *Reg.* v. *Great Western Railway Company* (*a*), *Reg.* v. *St. Nicholas Gloucester* (*b*). As to the allowance for direction, that is an allowance for what a tenant ought to do and would do himself: *Reg.* v. *St. Giles Camberwell* (*c*). With respect to the deduction for machinery, that ought not to be allowed; it forms part of the premises, and increases the value of the occupation: *Rex* v. *Lord Granville* (*d*), *Rex* v. *Birmingham and Staffordshire Gas*

(*a*) Ante, Vol. 4, p. 28; *S. C.*, 6 Q. B. 179.

(*b*) Cald. 262; 1 T. R. 723, n.

(*c*) 19 L. J., M. C., 122.

(*d*) 9 B. & C. 188.

Light Company (*a*), *Reg.* v. *Guest* (*b*), *Reg.* v. *London and South Western Railway Company* (*c*).

Lastly.—As to the claim of deduction for income-tax, that ought not to be allowed; it is a tax on the clear profits, which, but for the tax, the tenant would have to spend: *Reg.* v. *Great Western Railway Company* (*d*).

Greenwood, *Sanders*, and *Wise*, contrà.—The expense of the steam-tug is a proper deduction; it has no doubt earned part of the profits: *Rex* v. *Birmingham and Staffordshire Gas Light Company* (*e*). As to the expense of the direction, that ought to be allowed; the duties of the directors relate to the general superintendence of the docks, which no tenant could perform without assistance; remuneration to the directors, therefore, is a necessary expense. [*Coleridge*, J.—You cannot treat the directors in the same light as clerks. Is it not the same as if a number of partners were to manage the concern themselves?] It is submitted that this is not so; the Company's Act authorises the payment to the directors for their trouble: *Rex* v. *St. Giles Camberwell* (*f*), *Rex* v. *Hull Dock Company* (*g*), *Rex* v. *Oxford Canal Company* (*h*), *Reg.* v. *Mile End Old Town* (*i*), *Reg.* v. *Grand Junction Railway Company* (*j*). As to the allowance for cranes, steam-engines, and other fixed capital, they are trade fixtures, may be removed without injuring the premises, and ought not to be rated: *Rex* v. *Guest* (*k*), *Rex* v. *Birmingham and Staffordshire Gas Light Company* (*l*). As to income-tax on tenant's profits, that must be considered as any other tax, and must

(*a*) 6 A. & E. 634.
(*b*) 7 A. & E. 951.
(*c*) Ante, Vol. 2, p. 629; *S. C.*, 1 Q. B. 558.
(*d*) Ante, Vol. 4, p. 28; *S. C.*, 6 Q. B. 179.
(*e*) 6 A. & E. 634.
(*f*) 19 L. J., Q. B., 122.
(*g*) 3 B. & C. 516.
(*h*) 10 B. & C. 163.
(*i*) 10 Q. B. 208.
(*j*) Ante, Vol. 4, p. 1; *S. C.*, 4 Q. B. 18.
(*k*) 7 A. & E. 951.
(*l*) 6 A. & E. 634.

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be governed by the case of *Reg.* v. *Great Western Railway Company* (*a*).

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.—The first question which arose in this case was, whether the appellants were liable to be rated to the relief of the poor in respect of certain premises of which they are the owners, but not the occupiers, viz. the custom-house, in the occupation of her Majesty's Commissioners of Customs, at the rent of 500*l.* 10*s.* a-year; a manufactory, in the occupation of the West India Mail-packet Company, at the rent of 440*l.* a-year; and several workshops, in the occupation of J. White, at the rent of 75*l.* a-year.

The liability of the appellants to be rated for these premises was rested on a local Act of Parliament, 13 Geo. 3, c. 50, for regulating the poor in Southampton, which, to remedy the inconvenience produced by persons letting small tenements to strangers and others unable to pay rates, enacts that every person who shall let out his house in separate apartments, or ready furnished, to lodgers, or shall so let tenements built on ground appurtenant to his principal dwelling-house, shall, for the purposes of the Act, be deemed the occupier thereof. We are clearly of opinion, that this enactment does not apply to any of these premises, although they be all within the general outer inclosure of the Dock Company, except the custom-house, which is built on land of the Company at a considerable distance. Indeed, the point was not seriously pressed by the counsel for the respondents, and there is no necessity for saying more upon it.

But they strenuously objected to the deduction of 778*l.* from the sum on which the assessment was to be made, for the expenses of the steam-tug, contending that the steam-tug was entirely unconnected with, or at least collateral to,

(*a*) Ante, Vol. 4, p. 28; *S. C.*, 6 Q. B. 179.

the trade of keeping the docks; that the Company carried on two trades, and that the loss upon the trade of steam-tug keepers, which was unconnected with the property liable to be assessed, could not be allowed as a deduction from the profits of the docks. But the case finds that the Company, being empowered by their Act of Parliament to provide, out of their income, steam-tugs, for the purpose of towing any vessels into or out of the docks, from or to Southampton, or any part of the British Channel, did employ for this purpose the steam-tug in question, "which offers considerable advantage to those who use the docks, and may be fairly considered as an useful appendage to the docks, and conducive to the general profits of the concern, although it was not indispensably necessary, inasmuch as the duty might have been done by hiring other steam-boats at Southampton for each occasion, but at less advantage and convenience both to the Company and the public using the docks." We think that, upon this statement, the steam-tug must be taken to be ancillary to the docks, and part of the floating capital used in carrying on this concern. She was sometimes employed beyond the limits of the docks, but this was only with a view to the traffic carried on in unloading and loading cargoes within the docks. It was admitted, that if ropes fixed to a block in the docks had been run out far beyond the limits of the docks, and, being there fastened to ships about to enter, had been used to draw them to the wharf where they were to unload, the expense of these ropes would be a fair deduction from the profits of the concern in estimating the amount of the assessment; and the expense of the steam-tug seems to us to rest upon the same principle. The account is credited with the 616*l.* earned by her, and her receipts might have exceeded her expenses, thereby augmenting the sum to be assessed.

We entertained considerable doubt during the argument,

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respecting the 1000*l.*, under the head of "direction," stated to be "a reasonable remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the Company in managing the affairs of the docks, independently of the profit on capital employed by him." We were startled by such an allowance for what might be supposed to be done by the lessee personally, in addition to 5*l.* per cent. interest on capital, and 25*l.* per cent. for tenant's and trade profits, although the directors of the Company had declined to receive any remuneration for the last year before the assessment. But we have only to consider whether, in point of law, there ought to be an allowance in a concern of this sort for management, as well as a per-centage for interest on capital and tenant's profits. The reasonable amount of these must be deemed matters of fact which the sessions have determined, and the question for us is the same as if the sum put down for management had been 50*l.*, after an allowance of 3*l.* per cent. on capital, and 7*l.* per cent. for tenant's profits. Now, looking to the nature of this concern, and the allowance previously received by the directors, and to which they were still entitled, we cannot say that there ought not to have been an allowance for management, which might be stated as a reasonable remuneration to the lessee of the Company in the terms used by the learned Recorder. The case of *Reg.* v. *St. Giles Camberwell* (*a*), was strongly relied upon by the respondents; but there two concerns had been conjoined, one of which only was the subject of the rate, and an allowance was claimed in respect of a payment made to the directors for managing both.

The fourth question arose upon a deduction claimed by the appellants, which was disallowed. They contended that their cranes, steam-engines, and other like ponderous machinery, although attached to the freehold, ought to be

(*a*) 19 L. J., M. C., 122.

treated as stock-in-trade, and part of the capital which a tenant would have to invest in the business, so as to diminish instead of increase the rateable value of the property of the Company. The sessions did find as a fact, that these fixtures, worth 6550*l.* to an incoming tenant, although attached to the freehold, are capable of being detached from the freehold as easily, and with as little injury to it, as other fixtures put up for the purposes of the trade of the tenant, and usually valued as between incoming and outgoing tenants. But this is a rate upon buildings to which machinery is attached for the purposes of trade, and it has been solemnly decided that such real property ought to be assessed according to its existing value, as combined with the machinery, without considering whether the machinery be real or personal property, or whether it be liable or not to distress or seizure under a fieri facias, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant: *Rex* v. *The Birmingham and Staffordshire Gas-light Company* (*a*), *Rex* v. *Guest* (*b*). In this last case all the arguments pressed upon us to shew that such fixtures are stock in trade, and not to be taken into account in a rate on the realty, were urged, but urged in vain. It is of the greatest importance that a rule upon such a subject, which has been laid down and acted upon, should be adhered to, and we see no reason why this rule should be now disturbed.

On the last point no reasonable doubt can be entertained, the appellants claimed a deduction of 155*l.* for income tax in respect of the estimated profits of the tenant to whom the docks might be let. This is not a tax upon the subject-matter rated, which the tenant, as such, would be obliged to pay, but upon the net income of the tenant, after paying the rent of the premises by which his profits are earned. The cases cited apply to local taxes, which affect the subject-matter rated, and operate directly in diminution of the rent.

For these reasons, we are of opinion that the learned

(*a*) 6 Ad. & E. 634. (*b*) 7 Ad. & E. 951.

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Recorder of Southampton rightly disposed of all the questions brought before him, and that the order of sessions should be affirmed.

Order of sessions affirmed.

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REG. *v.* SOUTH EASTERN RAILWAY COMPANY.

REG. *v.* MIDLAND RAILWAY COMPANY.

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The mileage principle is not the correct mode of rating a railway to the relief of the poor; but the value which the land occupied in each parish produces, after the due allowances, is that upon which the railway is to be rated in such parish.

Any expenses, wherever arising, which the Company can shew to be necessary for keeping the hereditaments, which are the subject of the assessment, at their value, and for the just protection of the Company in each parish, may properly be taken into consideration.

A Railway Company is entitled to a deduction from the rateable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of such assessment. Such deduction is not included in working expenses. And, the fact that the Company has not incurred the expense, or laid by from their receipts any sum to meet it, will not disentitle them to make such deduction; in this respect, there is no substantial distinction between a railway and house property, or any other of a perishable nature, which must require renewal.

By agreement between the London and Brighton R. C. and the South Eastern R. C., the traffic of the latter was to pass free over a certain portion of the line of the former, in consideration of the traffic of the former passing free over a certain portion of the line of the latter. A certain distance of the line of the appellant Company within the respondent parish, was affected by this arrangement. No part of the South Eastern R. C. was within that parish:—*Held*, that this was the same in substance as if so many tickets were daily issued, without money paid for them, by the South-Eastern R. C. in return for so many receipts; the tickets mutually transferred representing so much money earned; these earnings being subject to the same deductions as if they were received in money; and that, in estimating the rateable value of the London and Brighton R. C. they were entitled to deduct the value of the tolls payable by them in respect of the passage of their traffic over an equal portion of the South Eastern line.

Overseers, in making a prospective rate, are to make it upon the supposed prospective value, ascertained as well as it can be from the latest evidence in their power as to the antecedent value. It cannot be required that the assumed and actual value should correspond in minuteness; and parish officers are justified in making the rate on the latest published account, if that was the latest information they had, or could be reasonably expected to procure; but if, before the rate is made, the Company communicate to them new facts affecting the rateable value, that ought to be taken into account.

A rate was made on the 20th of November, 1847, based on the half-yearly statement published by the Company upon the 10th of August, but made up to the 30th of June. In the interval between the 30th of June and the 20th of November the value of the machinery and plant of the Company had been materially increased from 26,000*l.* to 33,000*l.*:—*Held*, that on this outgoing the Company were entitled to a deduction.

ON an appeal by the above-named Company against a poor-rate made on the 20th November, 1847, for the par-

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ish of Croydon, in the county of Surrey, whereby the Company were rated in respect of so much of the railway as lay within the parish, and also of the stations, at the sum of 21,360*l.*, the sessions amended the rate by reducing the assessment to the sum of 15,765*l.*, subject to the opinion of this Court on the following case:—

The London, Brighton, and South Coast Railway Company was established under the name of The London and Brighton Railway Company, by 7 Will. 4 & 1 Vict. c. cxix., which authorised them to make a railway, to commence by a junction with a then intended railway, "The London and Croydon Railway," at Sellhurst Farm, in the parish of Croydon, and to pass thence to Brighton; and also to make a branch railway to Shoreham, another branch railway to Newhaven, and another branch railway to Lewes. Before the passing of that Act, an Act of Parliament had been obtained by the South Eastern Railway Company, (6 & 7 Will. 4, c. lxxv.), whereby that Company was established, and empowered to make a railway from the London and Croydon Railway to Dover, the line of which last-mentioned railway (as sanctioned by Parliament) was to pass for a considerable distance in a direction nearly parallel and approaching to the line of the London and Brighton Railway, as authorised by the first-mentioned Act of Parliament; and a provision was introduced into the first-mentioned Act (establishing the London and Brighton Railway Company), that if the South Eastern Railway Company should, within two years, obtain powers to divert their railway, so that the same should form a junction with the London and Brighton Railway at any point upon or to the northward of a place called "Earlswood Common," in the county of Surrey, the London and Brighton Railway Company was, upon such payment as therein mentioned, to transfer to the South Eastern Railway Company so much of the London and Brighton Railway, and the works, &c., as should be at or to the northward of the point at which the junction of

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the South Eastern Railway with the London and Brighton Railway should be authorised to be made. Before the expiration of the said period of two years, viz. on the 25th April, 1839, an agreement was entered into between the London and Brighton Railway Company and the South Eastern Railway Company, by which it was, among other things, agreed, that if Parliament should authorise the diversion of the South Eastern Railway, so that it should form a junction with the London and Brighton Railway at any point upon or to the northward of Earlswood Common aforesaid, the South Eastern Railway Company (in lieu of being entitled to so much of the London and Brighton Railway as should be to the northward of the point of junction between the London and Brighton Railway and the South Eastern Railway) was to be entitled to an absolute transfer to themselves of the southern moiety (to be ascertained by exact measurement) of the portion of the London and Brighton Railway lying between the proposed points of junction thereof with the London and Croydon Railway and with the South Eastern Railway respectively, and of all stations, works, &c.; and that from and after the transfer to the South Eastern Railway Company of the said southern moiety of the line of the London and Brighton Railway between such points of junction as aforesaid, and if the authority of Parliament should be obtained, enabling the said Companies to enter into agreements respecting the use by them respectively of the said several lines within the said points of junction, all the traffic of the South Eastern Railway Company passing in the carriages and trains of the same Company, or of the lessee or lessees of the said Company, to whom they should let the whole of their said railway, should, in consideration of the similar liberty and exemption next thereinafter secured to the London and Brighton Railway Company, be allowed to pass to and from the junction of the London and Brighton Railway with the London and Croydon Railway, over the portion of

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the London and Brighton Railway which should connect such junction with the South Eastern Railway, without payment of any toll or compensation to the London and Brighton Railway Company in respect of such passage; and in consideration thereof, all the traffic of the London and Brighton Railway Company passing in the carriages and trains of the same Company, or the lessee or lessees of the said Company to whom they should let the whole of their said railway, should be allowed to pass over the portion of the London and Brighton Railway which should be transferred to the South Eastern Railway Company according to the foregoing provisions, without payment of any toll or compensation to the South Eastern Railway Company in respect of such passage: but such traffic of each of the said Companies should be carried on without doing any wilful damage to the works belonging to the other of them, and subject to such general regulations as should have been made by such other Company for regulating the traffic upon their railway, and to such regulations as should from time to time be made by the said Companies jointly, relating to the premises; or that such arrangements should be made between the said Companies, under the authority of Parliament, as should most nearly carry into effect the last foregoing agreements, without prejudice to the rights of the said Companies, or either of them, to recover any tolls or other compensation from any other Company or party or parties using the railroads, or either of them; and that each Company should keep the road which should be vested in themselves according to the said agreement, and the works connected therewith, in sufficient repair and condition, at their own costs: provided that no lessee of either of the said Companies should be entitled to the privilege aforesaid, so long as such lessee should be in any way interested as a proprietor, lessee, or otherwise, in any other railway or portion of any other railway communicating with the South Eastern Railway or London and Brighton Railway, except

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as a shareholder only. An Act of Parliament (2 & 3 Vict. c. lxxix.) was, at the making of this agreement, before Parliament, and was shortly afterwards passed into a law, whereby the South Eastern Railway Company were empowered to divert their railway, so as to form a junction with the London and Brighton Railway at the point called "Earlswood Common;" and (after repeating the provisions contained in the former Act as to the transfer to the South Eastern Railway Company of so much of the London and Brighton Railway as lay to the north of the said point of junction) the South Eastern Railway Company were empowered to purchase, and the London and Brighton Railway Company were empowered to sell and transfer to the former, upon the terms and subject to the provisions and restrictions hereinafter contained, one moiety, to be ascertained by exact longitudinal measurement, and which should be nearest to the point of junction, thereby authorised to be made, of the South Eastern Railway with the London and Brighton Railway, or such other part as should be determined upon for that purpose by any agreement of both the said Companies under their common seals, of all that portion of the London and Brighton Railway which lay or would lie between the point of junction thereby authorised to be made with the South Eastern Railway, and the point of junction with the London and Croydon Railway, and all stations, lands, works, &c. belonging to or held for the purposes of the portion of the railway which should be so purchased: provided that the South Eastern Railway Company declared their option to make such purchase by such notice as therein mentioned. And by another clause in the same Act it was enacted, that from and after the transfer to the South Eastern Railway Company of the said moiety, or other part which should be transferred to them under the authority of that Act of the line of the London and Brighton Railway between such points of junction as aforesaid, it should be lawful for the said two Companies

from time to time to carry into effect any agreements between them respecting the use by them respectively of the line lying between the said two points of junction, and the proportion and manner in which they should respectively be entitled to the tolls arising from the same line, or either moiety or separate part thereof, and to receive and recover such tolls, or to remit the same respectively as between themselves, according to any such agreement, without prejudice to the tolls or rates which they respectively were or should or would be authorised to receive from any other parties, in the absence of any such agreement. [Copies of these Acts of Parliament, and of the agreement of the 25th April, 1839, accompanied the case, and were to be referred to as part thereof.]

The South Eastern Railway Company thereupon purchased and took from the London and Brighton Railway Company the southern moiety of the portion of the London and Brighton Railway lying between the said points of junction thereof with the London and Croydon Railway and with the South Eastern Railway respectively, and from that time the right (provided by the agreement of the 25th April, 1839) for the traffic of each Company to pass without payment of toll over the moiety belonging to the other Company of the said portion of railway lying between the said two points of junction, has been carried out in practice; the traffic of the London and Brighton Railway Company, until it became amalgamated with the London and Croydon Railway Company, and acquired the title of "The London, Brighton, and South Coast Railway Company," and the traffic of the said amalgamated Company since that time, passing in the carriages and trains of the said Companies respectively over and using the southern moiety of that portion of the line without paying any toll or compensation to the South Eastern Railway Company; and the traffic of the South Eastern Railway Company in like manner passing in the carriages and trains of that Company over and using the

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northern moiety of that portion of the line without paying any toll or compensation to the London and Brighton Railway Company, or to the London, Brighton, and South Coast Railway Company. Two miles and sixty-four chains of the northern moiety of the portion of the line of railway between the said two points of junction are situate within the parish of Croydon. No part of the southern moiety of the portion of the line of railway between the said two points of junction is situate within the parish of Croydon. Independently of and besides the reciprocal right of the two Companies to have their traffic so pass over the portion of the railway lying between the said two points of junction without payment of any toll or other compensation, the London and Brighton Railway Company before the said amalgamation, and the London, Brighton, and South Coast Railway Company since that time, have paid, and the latter Company still pay, a money toll to the South Eastern Railway Company for the privilege of using a certain other portion of the South Eastern Railway not in the parish of Croydon; and, on the other hand, the South Eastern Railway Company, before the said amalgamation, paid to the London and Brighton Railway Company, and since that time have paid and still pay to the London, Brighton, and South Coast Railway Company, a money toll for using another portion, consisting of seven miles and forty-two chains, of their railway not comprised within the terms of the Act of Parliament, (2 & 3 Vict. c. lxxix.) or the agreement of the 25th April, 1839, and of which portion one mile and eighteen chains are within the parish of Croydon. The London and Brighton Railway Company afterwards obtained Acts of Parliament authorising them to construct certain other branch railways communicating with their main line, viz. a branch railway from Chichester to Havant, from Croydon to Epsom, from Havant to Portsmouth, and from Kymer to Lewes, (called Kymer Branch).

By virtue of an Act of Parliament, 9 & 10 Vict. c. cclxxxiii.,

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the London and Brighton Railway Company and the London and Croydon Railway Company became, on and from the 1st day of July, A.D. 1846, amalgamated into and formed one Company, by and under the name of "The London, Brighton, and South Coast Railway Company."

At the beginning of the year 1847, the London, Brighton, and South Coast Railway Company had 107 miles of railway completed and in full operation, viz. the original line from London to Croydon, being a length of ten miles and forty chains, or thereabouts; the London and Brighton main line of railway from its junction with the London and Croydon Railway at or near Sellhurst Farm to Brighton, a length (without including the six miles so as aforesaid transferred to the South Eastern Railway Company) of thirty-five miles; the branch from Brighton, through Shoreham, to Chichester, twenty-eight miles and a half; and the branch from Brighton to Hastings, being thirty-three miles or thereabouts. Between the end of January and the end of June, 1847, the Company had completed and opened for traffic twenty-five additional miles of railway, viz. the branch from Chichester to Havant, nine miles, opened in March, 1847; the branch from Croydon to Epsom, eight miles, opened in May, 1847; and the branch from Havant to Portsmouth, seven miles, opened in June, 1847. Between that period and the end of 1847, fifteen miles more were opened, viz. the branch from Kymer to Lewes, nine miles and a quarter, and the branch to Newhaven, five miles and three quarters. The number of days during which these several branches were completed and in operation before the 30th June, the 20th November, and the 31st December respectively being calculated, it was agreed that the Company must be considered to have had lines of railway equal to 111 miles of railway completed and in operation for the whole year ending on the 30th June, 1847, and lines of railway equal to 126 miles of railway completed and in operation for the whole year ending on the 20th November or the 31st December, 1847. In

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the figures here given, the six miles transferred to the London and South Eastern Railway Company, being the southern moiety of the portion of railway between the points of junction aforesaid, are not included. Of the length of railway thus opened by the Company in and prior to June, 1847, six miles and thirty-eight chains are within the parish of Croydon. On the main line and branches there were, on the 30th June, 1847, and at the time of the making of the rate, forty-eight stations, exclusive of the great terminal station at London Bridge, and of these, three stations are within the parish of Croydon.

The London, Brighton, and South Coast Railway Company, since their railways came into operation, have been accustomed to provide the locomotive power and carriages, and have themselves conveyed upon their railway and its branches, as and when they were completed, passengers, cattle, and goods for hire, and, in point of fact, since the completion of the railway, the Company has been in the exclusive occupation thereof, no other carriers having availed themselves of the right conferred by the Acts, of providing carriages or locomotive power independently of the Company, except that under the agreement of the 25th April, 1839, and the Act of the 2 & 3 Vict. c. lxxix. the South Eastern Railway Company has found and provided its own carriages, and trains, and locomotives, for conveying its traffic over the northern moiety of the portion of railway lying between the two points of junction before mentioned.

At the ordinary half-yearly meeting of the London, Brighton, and South Coast Railway Company, held on the 10th August, 1847, the directors of the Company submitted to the proprietors a statement of the stock and share account of the Company, also a half-yearly statement, made up to the 30th June, 1847, of the capital account and of the revenue account of the Company; and at the next ordinary half-yearly meeting, held on the 5th February, 1848, the directors, in like manner, submitted to the proprietors a statement of the

stock and share account, and also a half-yearly statement, made up to the 31st December, 1847, of the capital account and of the revenue account of the Company. [Copies of these statements were annexed, and were to be referred to as part of the case.] The gross revenue earned on the railway during the year ending the 30th June, 1847, amounted to 418,600*l.* The gross revenue earned during the year ending the 31st December, 1847, amounted to 441,780*l.*; and if the earnings were calculated for the year ending the 20th November, 1847, the result would be substantially the same as for the year ending the 31st December, 1847. These items include the whole of the money toll paid by the South Eastern Railway Company, and also the sum which the sessions found would have been a fair annual rent for the South Eastern Company to pay to the appellants for the privilege of having their traffic pass over and using the northern moiety of the portion of line between the two points of junction aforesaid, if that privilege had been conceded to the South Eastern Railway Company for a pecuniary consideration. The gross revenue earned by so much of the railway as is within the parish of Croydon, during the year ending the 30th June, 1847, amounted to the sum of 39,000*l.*, and during the year ending the 31st December, 1847, to the sum of 40,027*l.*; and if the earnings were calculated during the year ending the 20th November, 1847, the result would be substantially the same. These sums include so much of the money toll paid by the South Eastern Railway Company to the appellants as was paid by the former in respect of that part of the London, Brighton, and South Coast Railway situate within the parish of Croydon, and they include the sum which the sessions found would have been a fair annual rent for the South Eastern Railway Company to pay to the appellants, for the privilege of having their traffic pass over and using so much of the said northern moiety of the portion of line aforesaid as is within the parish of Croydon, if such privilege had been conceded to them for

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a pecuniary consideration. The sessions found that the three stations situate in the parish of Croydon were of the rateable value of 1500*l.*

The respondents claimed a right to rate the Company on the principle of parochial earnings; that is to say, at such sum as a solvent tenant would pay as annual rent for the stations and portion of railway within the parish, regard being had to the net revenue earned within the parish. The appellants contended that the rate ought to be based on the mileage principle; that is, that they ought to be rated, in respect of that portion of their railway situate within the parish, in such proportion to the net earnings of the whole line of railway as the length of that portion of the railway within the parish bears to the total length of the whole line of railway, to which should be added the rateable value of the three stations within the parish.

The value of the working plant of the Company during the year which ended on the 30th June, 1847, amounted to 260,000*l.* Between that date and the 20th November, 1847, in consequence of the ascertained insufficiency of the plant to work the line efficiently, and further, in anticipation of what would be necessary to work the additional mileage consequent on the opening of the new branches, it was considerably increased, and on the 20th November, 1847, it was worth 350,000*l.*; and some additional plant being purchased still later in 1847, which countervailed the depreciation of the existing plant, it may be taken to have continued of the value of 350,000*l.* until and on the 31st December, 1847. The sessions found this to be a proper and not excessive quantity of plant for the efficient working of the railway during the year.

The sessions found, that if the mileage principle contended for by the appellants were the proper principle on which to base the rate, the following deductions were proper to be made from the gross revenue earned by the railway during the year ending the 31st December, 1847:—

1st. Working expenses for the year, including, among other things, locomotive power, maintenance of the way in a working condition, watching the same, rates, taxes, and Government duty, &c. (a)	£215,135
2nd. Rental of stations not in the parish	20,000
3rd. Interest on capital invested in working plant	17,500
4th. Depreciation of that plant during the year	35,000
5th. Tenant's profits, he paying insurance, income-tax, &c.	43,750
Total	£331,385

The gross earnings of the year ending the 31st December, 1847, (viz. 441,780*l.*) being thus distributed over the number of miles (126) which earned them, the result would be 3506*l.* as the gross earnings per mile; and the amount of deductions being distributed in like manner, would give 2630*l.* as the deductions per mile; and the net earnings per mile would be 876*l.*: and supposing the mileage principle to be the proper one, the sessions found the rateable value of the six miles and thirty-eight chains of railway within the parish of Croydon to be 5672*l.* and 1500*l.* to be the rateable value of the three stations within the same parish; and the sessions found that the rate on the appellants in respect of the railway and stations (if the mileage principle were the correct one) ought to be on the amount of those two sums added together, viz. on 7172*l.* The sessions were, however, of opinion, that the parochial earnings principle

(a) This sum included the money toll paid to the South Eastern Railway Company, and the supposed rent which the sessions found that the appellants would have had to pay to the South Eastern Railway Company for the privilege of using the six miles, being the southern moiety of the portion of railway between the two points of junction, if they had not conceded a similar right to the South Eastern Railway Company in respect of the six miles being the northern moiety. It also included such expenses as the sessions found to be incurred by the appellants in respect to the said toll and supposed rent from the South Eastern Railway Company.

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contended for by the respondents was the proper principle on which to base the rate.

The working expenses incurred in earning part of the revenue which is earned within the parish of Croydon—viz. that arising from the money toll paid by the South Eastern Railway Company in respect of the one mile eighteen chains, and the supposed rent which that Company would have given for the right which they acquired under the Act of Parliament, and the agreement of the 25th April, 1839, of using the two miles and sixty-four chains without payment of toll or compensation—are much less in proportion than the average working expenses incurred in earning the revenue upon the line generally. The working expenses incurred in earning the residue of the revenue within the parish are somewhat greater than the average on the line generally; and giving the appellants credit for the excess in the latter instance, as far as it went, against the saving in the former, the sessions found the rateable value of the six miles and thirty-eight chains of railway within the parish of Croydon, on the parochial earnings principle, to be 14,265*l.*; and the rateable value of the three stations therein being 1500*l.*, they accordingly (subject to the opinion of this Court) reduced the rate to the amount of those two sums added together, viz. to 15,765*l.* The respondents, however, claimed to be entitled to have the rate on the earnings made during the year ending on the 30th June, 1847, and that the deductions ought to have been made in regard to the state of things existing during that period, and not to the state of things existing during the year ending on the 20th November or the 31st December, 1847. The sessions were of opinion that the rate ought to be based on the state of things existing at the time the rate was made, and have assessed the rate on that principle. But if the Court shall be of opinion that the sessions ought to have allowed the last-mentioned claim of the respondents, the sessions found that the rate in respect

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of the portion of the railway and stations within the parish of Croydon ought to have been 9923*l.* instead of 7172*l.* if calculated on the mileage principle, and ought to have been 18,599*l.* instead of 15,765*l.* if calculated on the parochial earnings principle.

Besides the allowance already made (under the head of "working expenses") for the annual cost of keeping the way in a working condition, the appellants further claimed a right to deduct from the amount of the gross earnings of the year such additional sum, besides the annual cost aforesaid, as would countervail the depreciation which takes place in the permanent way, (rails, sleepers, &c.) so as to maintain the permanent way in a state to command a rent equal to that which the sessions have assumed to be a fair rent in fixing the assessment. The respondents denied the right of the appellants to this deduction. The sessions found that the rates in the parish of Croydon, including the rate which is the subject of the present appeal, are made in pursuance of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96; that there are in each rate two columns, one headed "Gross Estimated Rental," the other "Rateable Value;" and that the sum set in the latter column opposite to the property rated, (being the sum on which the assessment is made), varies from that set opposite the same property in the former column; the sum inserted as the rateable value being that which the parish officers judge to be the sum which would be received by the landlord after all the deductions contemplated by the Parochial Assessment Act; and the sum inserted as such rateable value in this parish being on the average about one-fourth less than the gross estimated rental in the case of buildings, about one-seventh less in the case of land occupied with farm-buildings, and one-tenth less in the case of land occupied alone. The sessions found that the sum of 100*l.* per mile would be a fit additional sum to deduct for the purpose of countervailing the depreciation which takes place in the permanent way,

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so as to maintain it in a state to command the rent aforesaid, supposing the Court shall be of opinion, that, under the circumstances, any deduction ought to have been made in respect thereof. But it being proved that the appellants had never hitherto, in fact, set apart any annual or other sum out of the earnings of the railway for the purpose of meeting this depreciation of the permanent way, the sessions disallowed the claim of the appellants to this deduction. If the Court should be of opinion that the appellants were entitled to this deduction, the sessions found that the rate (whether the mileage or parochial earnings principle be adopted by the Court) should be further reduced by the sum of 647*l.* 10*s.*

The appellants further contended, that, assuming the parochial earnings principle to be the proper one, the rate should have been based on the net actual earnings of the railway within the parish, without including therein anything in respect of the supposed rent or sum which the South Eastern Railway Company might reasonably be expected to pay for the right of having their traffic pass over so much (two miles and sixty-four chains) as lies within the parish, of the northern moiety of the portion of railway between the two points of junction before mentioned, without payment of any toll or other compensation, if that right had been conceded to them for a pecuniary consideration; or, supposing such supposed rent to be rightly included in the earnings within the parish, that a corresponding amount ought to be allowed to the appellants as working expenses, inasmuch as, to earn such supposed rent, the appellants must be supposed to have paid an equal sum to the South Eastern Railway Company for the privilege of having their (the appellants') traffic pass over two miles and sixty-four chains of the southern moiety of the said portion of railway between the said two points of junction. The sessions were of a contrary opinion, and, as before mentioned, they have in the sum to which they have so as aforesaid reduced the

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rate, included the amount of the rent or annual sum which, in their opinion, the South Eastern Railway Company might have been expected to pay for the last-mentioned right in respect of the two miles and sixty-four chains which are within the parish of the northern moiety of the said portion of railway, if such right had been conceded to them for a pecuniary consideration, except that, in estimating the working expenses to be deducted from the gross earnings within the parish, they have allowed to the appellants, besides the general cost of maintaining the way in a working condition, watching the same, &c., such further sum as they found to be reasonably incurred by the appellants in and about the collecting the said supposed rent.

If the Court shall be of opinion that the decision of the sessions was erroneous in this respect, and that the whole of the said supposed rent or annual sum in respect of the two miles and sixty-four chains within the parish, ought to have been excluded from the gross earnings, or that an equal sum ought to have been deducted as working expenses, then the sessions find that the rate ought to be further reduced by deducting from it the sum of 5009*l.*, (supposing the Court adopts the parochial earnings principle for either year), and by deducting from the rate the sum of 554*l.* if the mileage principle be adopted, for the year ending 31st December, 1847, or the sum of 629*l.*, if the mileage principle be adopted, for the year ending 30th June, 1847; the Court to have the power of amending, quashing, or otherwise dealing with the rate as they may deem right.

Pashley and *J. Clerk*, in support of the order of sessions (*a*).—First, the parochial or earnings principle is the proper basis of the rate, and not the mileage principle. The point has never been decided, though the mileage principle, as a convenient mode of rating railways, has been

(*a*) Before *Coleridge*, J., *Wightman*, J., *Erle*, J., and *Patteson*, J.

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adopted: *Reg.* v. *The London and South Western Railway Company* (*a*), *Reg.* v. *The Grand Junction Railway Company* (*b*), *Reg.* v. *The Great Western Railway Company* (*c*). Canals have always been rated on the earnings principle: *Rex* v. *Kingswinford* (*d*), *Rex* v. *The Oxford Canal Company* (*e*), *Rex* v. *Woking* (*f*), *Reg.* v. *Mile End Old Town* (*g*).

Secondly, No allowance ought to be made for depreciation of the permanent way, no part of the revenue of the Company having been set apart for that purpose. This was decided in *Reg.* v. *The Great Western Railway Company* (*c*), *Rex* v. *Hull Dock Company* (*h*), *Reg.* v. *The Grand Junction Railway Company* (*b*), *Crease* v. *Sawle* (*i*).

Thirdly, As to the deduction in the nature of working expenses, in respect of the exchange toll payable to the South Eastern Railway Company by the appellants for passing over the southern moiety of the common line, that is not an outgoing necessary to produce traffic on the appellants' line, and ought not to be allowed. [*Wightman*, J.—Is it not essential to the Brighton Company earning some profit on that part of their line which is in Croydon, that they should pass over this part of the South Eastern line? and if so, how can it be said that the profits arising from their occupation are not increased thereby?] That might be said of the Company carrying on any other trade at Croydon. In *Reg.* v. *The Grand Junction Railway Company* (*b*), the profits made by the Company in carrying over lines belonging to other Companies was considered to be a profit of trade earned by the Company as carriers, and did not affect the value of the occupation in respect of which

(*a*) Ante, Vol. 2, p. 629; *S. C.*, 1 Q. B. 558.
(*b*) Ante, Vol. 4, p. 1; *S. C.*, 4 Q. B. 18.
(*c*) Ante, Vol. 4, p. 28; *S. C.*, 6 Q. B. 179.
(*d*) 7 B. & C. 236.
(*e*) 10 B. & C. 163.
(*f*) 4 Ad. & E. 40.
(*g*) 10 Q. B. 208.
(*h*) 5 M. & Sel. 394.
(*i*) 2 Q. B. 862.

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the rate was made. [They cited *Barrington's case* (*a*), *Lucy* v. *Levington* (*b*), 1 Kent's Com. p. 459.]

Fourthly, The estimate ought to be made on the facts existing at the time when the rate was made, and should be based upon the accounts of the last half-yearly meeting of the Company preceding the rate. The 107th sect. of the Railway Clauses Consolidation Act (*c*) requires an account of the receipts and expenditure of the Company to be prepared, and a copy to be sent to the overseers of the several parishes through which the railway passes, and that is the safest evidence to base the calculations upon. [*Erle*, J.—The test is, what rent would a tenant from year to year be expected to give, after making all proper deductions, at the time when the rate was made. Then, suppose between the half-yearly meeting and the time of making the rate, the railway were destroyed, surely no rate ought to be imposed.] They cited *Reg.* v. *The London and South Western Railway Company* (*d*), *Rex* v. *Hull Dock Company* (*e*).

Gurney, and *Wallinger*, Serjt., contrà.—First, The mileage principle is the only mode of arriving at the net annual value of land occupied in a given parish. The parochial earnings principle cannot be applied; for if the gross earnings in a given parish can be ascertained, how are the expenses to be distributed? [*Coleridge*, J.—No doubt the mileage principle may be applied to outgoings common to the whole line; but those that are peculiar to particular parishes, perhaps, might have to be attributed solely to them.] Most of the outgoings could be fairly distributed only on the mileage principle; that principle is adopted on canals where the same rate of toll exists: *Rex* v. *Woking* (*f*); but where there are different rates of toll in different parishes, then no doubt the

(*a*) 8 Rep. 271.
(*b*) 1 Vent. 175.
(*c*) 8 Vict. c. 20.
(*d*) Ante, Vol. 2, p. 629; *S.C.*, 1 Q. B. 558.
(*e*) 5 M. & Sel. 394.
(*f*) 4 Ad. & E. 40.

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parochial earnings principle is correct: *Rex* v. *Kingswingford*. Here there is a uniform toll on the whole line, and the principle of rating canals is applicable: *Reg.* v. *The Grand Junction Railway Company*, *Reg.* v. *Mile End Old Town*. [*Coleridge*, J.—If the parochial earnings can be ascertained, they will furnish a more correct result than that on the mileage principle, by which a very productive mile might be rated only at the same ratio as a very unproductive mile.] The Company are bound to furnish the parishes with the amounts of the total receipts and expenditure, so that there can be no difficulty in adopting the mileage principle(*a*).

Secondly, The Company ought to be allowed a deduction for the average annual depreciation of the permanent way. This was not disputed in *Reg.* v. *The Grand Junction Railway Company*; though, no doubt, in *Reg.* v. *The Great Western Railway Company*, the claim for a deduction on that account was disallowed; but one reason for that disallowance was, that the Company had, in violation of their Act, applied capital instead of revenue to that purpose. "The average annual expense necessary to maintain the land in a state to command such rent," is to be deducted; it matters not whether or not that expense has been paid, or a fund has been laid by for the purpose; a periodical expense must necessarily arise, which must be discharged by the Company out of its funds; and it is impossible to say what sum ought to be laid by until the time arrives for its expenditure: *Rex* v. *Tomlinson*(*b*), *Rex* v. *Lower Mitton*(*c*). [*Coleridge*, J.—The words of the 6 & 7 Will. 4, c. 96, s. 1, are, "deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Could the ratepayers deduct insurance if they did not pay it?] It is submitted that they could—at all events they could

(*a*) See 8 Vict. c. 20, s. 107. (*b*) 9 B. & C. 163. (*c*) Id. 810.

make a deduction for repairs. The rate is to be made prospectively; and, therefore, the probable value of the subject-matter in the current year must be looked to: *Reg.* v. *Westbrook* (*a*).

Thirdly, As to the exchange toll. The value of the occupation in the parish of Croydon is increased by the privilege of passing toll-free on the portion of the South Eastern Railway; that privilege contributes to earn profits in Croydon, and its value must be deducted.

Fourthly, The calculation of the hypothetical rent must be made with reference to the facts found to be actually existing when the rate was made: *Reg.* v. *The Grand Junction Railway Company* (*b*). That is the correct principle of determining what rent the line might reasonably be expected to let for. This is assumed in *Reg.* v. *The Grand Junction Railway Company* (*b*); and there Lord *Denman* says, "it must never be forgotten that the propriety of a poor rate can only be determined by reference to the facts found to be actually existing when it was made." They cited *Rex* v. *Bedworth* (*c*), and *Reg.* v. *Everest* (*d*).

Cur. adv. vult.

(*a*) 10 Q. B. 178.
(*b*) Ante, Vol. 4, p. 1; *S. C.*, 4 Q. B. 18.
(*c*) 8 East, 387.
(*d*) 10 Q. B. 193.

REG. *v.* SOUTH EASTERN RAILWAY COMPANY.

ON an appeal by the Company against a poor rate for the parish of Westbere in the county of Kent, made on the 11th July, 1848, whereby the Company were rated as owners and occupiers of a part of a branch of the South Eastern Railway, (which branch runs from the said South Eastern Railway near Ashford to the city of Canterbury, and the towns of Ramsgate and Margate); which part of the said

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branch, in respect of which the said Company are rated, extends in length 202½ chains within the parish of Westbere, and was rated in the said rate at the sum of 1260*l.*, being at the rate of 500*l.* per mile. The Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court on the following case:—

The South Eastern Railway Company was established and incorporated under that name by stat. 6 & 7 Will. 4, c. lxxv. By stat. 7 & 8 Vict. c. xxv. intituled "An Act to enable the South Eastern Railway Company to make a railway from the said South Eastern Railway near Ashford, to the city of Canterbury, and the towns of Ramsgate and Margate, and to join the Canterbury and Whitstable Railway," the South Eastern Railway Company were empowered to make such last-mentioned railway. [Copies of these Acts acccompanied the case, and were to be taken as part thereof.] The South Eastern Railway Company have obtained several other Acts of Parliament; and under the powers contained in their Acts, or some or one of them, the Company have completed the present main line of the South Eastern Railway, leading from the London and Croydon Railway to Dover, and several branches communicating therewith, and, amongst other branches, a branch leading from the said main line of the South Eastern Railway, near Ashford, to the city of Canterbury, and the towns of Ramsgate and Margate, and joining the Canterbury and Whitstable Railway. The said branch railway, leading from the said main line, passes, for the length of 202½ chains, through the parish of Westbere. There is no station in the parish of Westbere. The total number of miles open for traffic upon the main line of the South Eastern Railway, together with the branches communicating with it, is 161. The said Company are in the exclusive occupation of the main line and branches. They provide locomotive power and carriages, and carry on the business of conveying passengers and goods for hire upon the said main line and branches; such conveyance of pas-

sengers and goods for hire is the only source of profit or revenue arising to the Company from the main line and branches. The above-mentioned main line, and also the branches, extend through a great number of parishes. The stations and buildings throughout the main line and branches are rated separately from the railway. Throughout the main line and branches the expense of repairs and maintenance of the railway may be taken as proportional to the length in the parish, as compared with the whole length of the main line and branches. The traffic both in passengers and goods is much greater upon the main line than upon any or either of the branches, and the greater part of the traffic upon the main line never passes over any part of the branch railway which runs through the parish of Westbere. The traffic both in passengers and goods over any one mile, or portion of a mile, upon any part of the main line, is greater than the like traffic over an equal length of the line of railway in any part of the parish of Westbere; and the expense of conveying passengers and goods, and the rate of charge by the Company for such conveyance, may be taken as the same throughout the whole of the main line and branches, viz. with respect to passengers, in proportion to the distance travelled by each passenger, and with respect to goods, in proportion to their weight, and the distance they are carried along the line of railway, whether it be the main line or any one of the branches. The annual net profits of the Company, both from the passengers and goods traffic, over any one mile or portion of a mile of the main line, exceed those arising from the like traffic over any equal length of the line of railway in the parish of Westbere. By the rate above mentioned, the Company were rated in respect of the 202½ chains of the line of the branch railway which runs through the parish of Westbere, in the sum of 126*l.*, being at the rate of 500*l.* per mile. The rate above mentioned was made and based upon the mileage principle, viz. by first ascertaining the gross receipts of

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the Company from the traffic upon all the lines of railway in their occupation, as well the main line as the branches, considered as one entire concern; by deducting from such gross receipts the usual expenses and allowances upon all such lines and branches, considered as one entire concern; by treating the residue or balance of such gross receipts, after such deduction for expenses and allowances, as the net rent or fair rateable value of the whole of the main line and branches; and by dividing the same among the several parishes upon the mileage principle, allotting as the rateable value of so much of the branch line of railway as lies in the parish of Westbere such a proportion of the rateable value of the whole of the main line and branches, ascertained as aforesaid, as the length of that portion of the railway which lies in the parish of Westbere bears to the length of the whole of the main line and branches together. The respondents contended, that, under the circumstances, the above was the proper mode of ascertaining the rateable value. The appellants, on the other hand, contended that the rate ought to have been based on the principle of parochial earnings, viz. that they ought to have been rated at such a sum as a tenant might be expected to give as annual rent for that portion of the branch railway situate within the parish of Westbere, regard being had to the net revenue earned by the portion of the railway situate within that parish, such rent being ascertained by taking the gross annual receipts of the Company arising from that portion of the Ashford, Ramsgate, and Margate branch line of railway situate in Westbere parish, such gross receipts being ascertained by taking a proportion of the fare paid by every passenger who has during the course of the year been carried by the Company over any part of the railway in Westbere, such proportion bearing the same ratio to the whole sum paid by such passenger for his fare for the whole distance travelled by him over the Company's main line and branches, as the distance travelled by him in

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Westbere bears to the whole distance travelled by him on the Company's main line and branches; and also by taking a proportion of the gross receipts for goods traffic in Westbere, calculated upon a similar principle; then by taking from such gross receipts for passengers and goods traffic in Westbere the deductions prescribed and directed by the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, according to the mileage principle, applied to such Ashford, Margate, and Ramsgate line only; the results shewing the rent which a tenant might reasonably be expected to give for the portion of the railway situate within Westbere; which mileage principle, the appellants contend, gives the nearest approximation to the actual expenses and usual allowances, in respect of the respondent parish, which can with any certainty be arrived at.

If the Court should be of opinion, that, under the circumstances, the mileage principle contended for by the respondents is the proper one, then the sessions found that the sum of 1260*l.* is the proper rateable value of that part of the branch line of railway which is situate in Westbere, and the rate was to stand confirmed; but if the Court should be of opinion, that, under the circumstances, the mileage principle contended for by the respondents ought not to have been adopted, or that the principle contended for by the appellants is the correct principle, then the sessions found that the sum of 506*l.* is the proper rateable value of that part of the branch line of railway which is situate in the respondent parish; and in that case the rate was to be amended by reducing it to that amount, and the order of sessions confirming the original rate was to be reversed. The Court to have the power of amending, quashing, or otherwise dealing with the rate as they might deem right.

May 1st.

Horn, in support of the order of sessions, contended (*a*)— First, that the main line and branches were properly treated as one entire concern. Secondly, that the rate ought to be

(*a*) Before Lord *Campbell*, C. J., *Patteson*, J., *Wightman*, J., and *Erle*, J.

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assessed on the mileage principle. He cited *Rex* v. *Topham* (*a*), *Reg.* v. *The Cambridge Gas-light Company* (*b*), *Reg.* v. *The London and South Western Railway Company* (*c*), *Reg.* v. *The Grand Junction Railway Company* (*d*), and *Reg.* v. *The Great Western Railway Company* (*e*).

Rose, contrà, contended—First, that the main line and branch lines were distinct, and ought to be separately assessed, citing *Rex* v. *Kingswinford* (*f*), *Rex* v. *Milton* (*g*), and *Rex* v. *Barnes* (*h*). Secondly, that the parochial earnings principle was the correct mode of rating the line. He cited *Rex* v. *Lumsdaine* (*i*).

Cur. adv. vult.

(*a*) 12 East, 546.
(*b*) 8 Ad. & E. 73.
(*c*) Ante, Vol. 2, p. 629; *S. C.*, 1 Q. B. 558.
(*d*) Ante, Vol. 4, p. 1; *S. C.*, 4 Q. B. 18.
(*e*) Ante, Vol. 4, p. 28; *S. C.*, 6 Q. B. 179.
(*f*) 7 B. & C. 236.
(*g*) 3 B. & Ald. 112.
(*h*) 1 B. & Ad. 113.
(*i*) 10 A. & E. 157.

REG. *v.* THE MIDLAND RAILWAY COMPANY.

ON an appeal by the Midland Railway Company against a poor-rate for the parish of Basford, in the county of Nottingham, bearing date the 16th of February, 1849, whereby the Company were rated in respect of their occupation of one mile and three quarters of railway in that parish, the Court of Quarter Sessions confirmed the rate, subject to a case, which stated, that the whole length of railway belonging to and worked by the Company is 453 miles. It is a public iron railway, made, maintained, and worked in the usual manner, for the conveyance of passengers and goods in carriages moved by locomotive engines, under the several Acts of Parliament (local and personal, public) touching the Midland Railway Company, and the general railway Acts. Part of the railway, to the extent of one mile and three quarters, lies in the parish of Basford,

in the county of Nottingham; and it was against a rate for the relief of the poor of this parish, made upon the Company in respect of the occupation of this one mile and three quarters of railway that the appeal was had. At the trial of the appeal, the point in dispute between the parties was as to the principle upon which the rateable value of the occupation by the Company of the one mile and three quarters of the railway lying within the parish of Basford ought to be ascertained. The principle contended for by the respondents was, that the rateable value ought to be estimated upon what is called the mileage principle—that is, by calculating the total rateable value of the occupation by the Company of the whole line of the Midland Railway, including the one mile and three quarters in question, and then dividing that amount by the number of miles of the whole line, so as to obtain an average of the rateable value of the occupation of each mile; and that, consequently, the rateable value of one mile and three quarters of the railway occupied by the Company in Basford would bear the same proportion to the total rateable value of the whole Midland Railway as one mile and three quarters bears to 453 miles. The principle contended for by the appellants was, that the rateable value of one mile and three quarters of railway occupied by the Company in Basford ought to be estimated with reference solely to the net profits earned by the railway within that parish, and without any reference to the amount of net profits earned elsewhere, or to the rateable value of any portion of the railway lying in any other parish. The rate had been made upon the principle contended for by the respondents. It was admitted by the respondents, that if the principle contended for by them was incorrect, the Company were over-rated, and that the assessment on the appellants ought to be reduced. It was admitted by the appellants, that if the principle contended for by the respondents was correct, the Company were not over-rated, and that the rate was good. The Court of Quarter Sessions, by their order,

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confirmed the rate, subject to the opinion of this Court. If this Court shall be of opinion that the principle contended for by the respondents is correct, then the order of the Court of Quarter Sessions is to be confirmed. If the Court shall be of opinion that the principle contended for by the respondents is incorrect, then the order of the Court of Quarter Sessions and the rate are to be quashed.

May 29th.

R. Hall and *Denison*, in support of the order of sessions(*a*). —The parochial earnings principle is the correct mode of ascertaining the probable rental of the property to be rated only when it can be ascertained—first, what the gross receipts are; secondly, what the gross expenses are; and, thirdly, what the tenant's profits are: where these three cannot be correctly ascertained, the earnings principle is inapplicable, and the mileage principle is the best mode of arriving at the nearest approximate rateable value. Where the whole subject of the rate lies within one parish, these objects are secured; but where the subject of the rate lies in several parishes, the earnings are not strictly in that parish alone, and there the earnings principle is inapplicable. The difficulty in rating railways has arisen from attempting to apply to them a principle applicable only to the simple class of cases. In *Rex* v. *The New River Company* (*b*), and in *Rex* v. *Kingswinford* (*c*), the earnings principle was applied to canals; but in the latter case both the receipts and the expenses in the parish were found—the difficulties attaching to a complex case did not exist. But the same principle cannot be applied to railways on which it is next to impossible to ascertain local profits, and quite impossible to ascertain local outgoings, which must vary according to the nature of the embankments and works in the several parishes. In such cases, the nearest approximate earnings must be ascer-

(*a*) Before Lord *Campbell*, C. J., *Patteson*, J., *Coleridge*, J., and *Erle*, J.

(*b*) 1 Man. & S. 503.

(*c*) 7 B. & C. 236; 1 Man. & R. 20.

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tained; and that can best be effected by adopting the mileage principle: *Reg.* v. *The Cambridge Gas-light Company* (*a*), *Rex* v. *Woking* (*b*), *Reg.* v. *Mile End Old Town* (*c*), *Rex* v. *St. Peter's, Worcester* (*d*). [Lord *Campbell*, C. J.—If the expenses and the receipts were the same per mile, the mileage principle would no doubt be the most just.] The cases of *Reg.* v. *The London and South Western Railway Company* (*e*), *Reg.* v. *The Grand Junction Railway Company* (*f*), and *Reg.* v. *The Great Western Railway Company* (*g*), have decided nothing. Canal cases are inapplicable to railways, which differ from all other property. [*Coleridge*, J.—The mileage principle is almost certain to do injustice to some parishes; and is it not an objection to that principle, that injustice will necessarily be done to some other parishes who are not before the Court?] That is irremediable, from the impossibility of ascertaining the net profits of the railway Company in their parish. They referred to sections 127, 128, and 129 of 7 & 8 Vict. c. xviii.

M. D. Hill and *Willmore*, contrà.—The distinction of the cases into simple and complex is unsound. In the case of canals and railways, the profit made is in exact proportion to the length of the canal or railway used; whereas in gas works and water works the profit made is in proportion to the amount used, at whatever distance from the main works the gas or water is supplied. The net earnings in each parish, irrespective of any net earnings in another parish, may be considered: *Reg.* v. *Mile End Old Town* (*h*). [Lord *Campbell*, C. J.—In all these cases the person making the rate must travel out of the parish to get at what a tenant would pay. The value of the whole concern in all

(*a*) 8 Ad. & El. 73, 81.
(*b*) 4 Ad. & El. 40; 5 Nev. & M. 395.
(*c*) 10 Q. B. 208.
(*d*) 5 B. & C. 473.
(*e*) Ante, Vol. 2, p. 629; *S. C.*, 1 Q. B. 558.
(*f*) Ante, Vol. 4, p. 1; *S. C.*, 4 Q. B. 18; Dav. & M. 237.
(*g*) Ante, Vol. 4, p. 28; *S. C.*, 6 Q. B. 179.
(*h*) 10 Q. B. 208.

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the parishes is to be ascertained, and then it is to be distributed among the several parishes. Perfect equality may not be attainable, but we must approach as near to it as practicable. One principle might be—suppose the railway Company not possessed of a portion of a railway in a parish, estimate what they would give for the privilege of passing over it, and assess them on that amount.] That is the correct principle: *Rex* v. *Kingswinford* (*a*), *Reg.* v. *The London and South Western Railway Company* (*b*), *Rex* v. *The Oxford Canal Company* (*c*), *Reg.* v. *Bristol Dock Company* (*d*), *Rex* v. *The Trent and Mersey Navigation Company* (*e*). The net earnings within the parish are found thus: suppose a railway 100 miles long has one mile in a parish; first, take what is paid by every train in respect of a mile—that will give the gross earnings; secondly, deduct all the peculiar expenses for that mile, if any; also the expenses which are not peculiar to that mile, which must be made on the mileage principle; and the result will be the net earnings. No doubt it is impossible to ascertain the actual rent; but the mileage principle is the most remote approximation to it. [*Patteson*, J.—If the decision in *Rex* v. *Woking* (*f*), with respect to a navigable river, is applicable to railways, it will be necessary to estimate the profits on every passenger on every journey and every parcel.] No doubt: but if the mileage principle is adopted, a parish in Somersetshire, in the case of the Great Western Railway, would get the benefit of the traffic between London and Swindon. If the parochial earnings principle be not correct, it does not follow that the mileage principle is the true one; it might be a better principle that the value of the works in each parish should be taken. [Lord *Campbell*, C. J.—That is contrary to all principle and all decisions. If that were adopted, we must take into considera-

(*a*) 7 B. & C. 236; *S.C.*, 1 Man. & R. 20.

(*b*) Ante, Vol. 2, p. 629; *S. C.*, 1 Q. B. 558.

(*c*) 10 B. & C. 163.

(*d*) Ante, Vol. 2, p. 571; *S. C.*, 1 Q. B. 535.

(*e*) 1 B. & C. 545.

(*f*) 4 Ad. & El. 40.

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tion the expenses of making tunnels, cuttings, and other works. At any rate the mileage principle can only be adopted where there is an equal amount of traffic and expenses throughout. [*Coleridge*, J.—Suppose a station in parish A. necessary in order to earn the profits in parish B.; if a deduction is to be made on that account, the overseer must go out of the parish.] That would be calculating profits earned in another parish. [They cited *Reg.* v. *The Bristol Dock Company* (*a*), *Rex* v. *Kingswinford* (*b*), *Rex* v. *Lower Mitton* (*c*), *Rex* v. *The Chelmer and Blackwater Navigation Company* (*d*).

Cur. adv. vult.

Feb. 22*nd*.

COLERIDGE, J., now delivered the judgment of the Court.—These cases have stood over for consideration for some time; the first was argued before all the present members of the Court, except my Lord *Campbell*; and as it raises the only question which is for decision in the other two, it will be convenient to dispose of it first. Our judgment on that point in this case will dispose of the other two cases.

The *first* question is, as to the principle on which the rate was to be imposed, whether upon what has been called the mileage principle, that is, by treating the whole line of railway (trunk and branches) as one entire subject-matter, and the whole rateable value, however constituted, as entire, and then, for the purpose of rating, dividing it among the several parishes, simply according to the distance which the line passes through each; or upon the ordinary principle of ascertaining the actual rateable value of the land occupied by the Company in each parish, by the rules which are applicable to any other land occupied by other bodies or persons for other purposes.

(*a*) Ante, Vol. 2, p. 571; *S. C.*, 1 Q. B. 535.

(*b*) 7 B. & C. 236; *S. C.*, 1 Man. & R. 20.

(*c*) 9 B. & C. 810; *S. C.*, 4 Man. & R. 711.

(*d*) 2 B. & Ad. 14.

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The judicial decision of this question has hitherto been avoided by agreement and mutual concession; and we have delayed to pronounce our judgment on it, not so much from the difficulty of determining the rule of law, as from that which arises on its practical application. This presses particularly against what is called the parochial principle. How are you, by any means now in the power of parish authorities, to ascertain the particulars of profit and the outgoings, from a comparison between which the rateable value of the land occupied is to be deduced, both profit and outgoings being affected by circumstances spread through the whole line? On the other hand, against the mileage principle is to be urged, that although, as regards the railway Company—an entire body, with an entire interest—it is matter of indifference how you divide a rate assumed to be entire for the whole line; yet, as the parishes are bodies with separate interests, there is a manifest injustice in attributing to the same space of land the same proportionable share of the whole rate everywhere; the land in the several parishes notoriously earning the profits, and occasioning the outgoings in very different proportions; because you cannot do this without depriving some parishes of what they should receive in order to give to others what they should not. If, however, the legal principle be clearly ascertained, it is clear that the difficulties in applying it, or even the practical imperfection which circumstances may occasion in applying it, are not to influence our decision. It is unnecessary to consider what the force of the argument would be, if it could be shewn that there was an absolute impossibility of applying it, for nothing like that exists in the present case.

Now, upon the legal principle we have no doubt. The poor-rate and the principles of its assessment are entirely statutory. The 6 & 7 Will. 4, c. 96, made expressly with the view "to establish one uniform mode of rating for the relief of the poor," prescribes the rule: the rate must be

made on "an estimate of the net annual value of the several hereditaments rated thereunto," such value to be arrived at in the manner stated in the 1st section. The subject is parochial; the inquiry is to be conducted by parochial authorities, with limited powers. If any matters specified in the section are locally situate without the parish—that is, if any such affect the amount of "the net annual value," or "rent reasonably to be expected"—they will of necessity fall within the range of the inquiry; but beyond this the principle does not go.

This principle, so limited and understood, was not first created by the statute just mentioned; the Court had decided so early as 1827, in the case of *Rex* v. *Kingswinford* (*a*), that it was to be found in the original statute of Elizabeth; and since that decision it has been uniformly applied to cases where the same party, whether company or individual, occupies in different parishes land forming one entire property, such as a canal, though the profits may be earned in different proportions, and with a different rate of outgoings in each. The value which the land occupied in each parish produces, after the due allowances, is that upon which the occupier is to be rated in each.

It is unnecessary to cite more authorities in support of a proposition now become settled; the decisions will be found to flow in a remarkably uniform current since the case last cited. Whether the circumstances of railways, which were in 1836 a comparatively infant interest, escaped the notice of the Legislature, or were advisedly thought not to need any special provision, certain it is that none was made; and, as in its broad principles the occupation of a railway Company does not differ from that of a canal Company, a Court of law has no choice but to apply to it the same general law under which, in its terms, it certainly falls.

It is to be remembered, that the amount of assessment on

(*a*) 7 B. & C. 236; 1 Man. & R. 20.

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a particular occupier is a question between that occupier and the rest of the contributors to the whole rate; and the consideration of that occupier's relation to the contributors to another rate in another parish is irrelevant to this question; he may be rated in that other parish too high or too low, but this is a matter which does not interest the contributors to the first-named rate, nor have they influence in the settlement of it: and this suggests the answer to a difficulty raised on the argument in this case—if you give Croydon the full benefit of all the earnings made by the railway in the parish, what is to be done in the case of a parish on some branch line, in which the Company may work at a loss? The answer is, that that case must be decided, when it arises between the Company and that parish, on the same principle precisely as the present, without reference to Croydon.

This is quite distinct, however, from the consideration of any expenses, wherever arising, which the occupier can shew to be necessary for keeping the hereditament which is the subject of the assessment at the value which is made the measure of it. The language of the statute is quite general on this point, and lets in all considerations which are necessary for the just protection of the Company in each parish.

Whatever difficulty there may be in applying this principle, it has been in fact overcome in the present case. Here, under circumstances more than commonly complicated, the sessions have presented us with calculations to meet the parochial as well as the mileage principle; they are exclusively the judges of the fact, and we must assume that they have been able to arrive at a just conclusion. Nor, indeed, does it appear to us, under any circumstances, to be insuperably difficult to impose the rate fairly, if only the interested parties will deal candidly with each other. We cannot assume that they will deal otherwise; but if the Company should improperly refuse to the overseers of any

parish, information which it is in their power to afford, and is proper to be afforded, for the purpose of fixing the assessment on them justly, they must, if properly dealt with, be the sufferers.

The 257th section of stat. 7 Will. 4 & 1 Vict. c. cxix. gives the overseers a right, under a very stringent penalty, to the inspection of certain accounts, which the Company are by the same section compelled to keep, under another serious penalty. These accounts would suffice for a rude assessment, deficient indeed in making due allowance for outgoings; but that deficiency would press on the Company itself.

By the 192nd section, however, they are required to keep and make up half-yearly a particular account "of the money received by or for the use of the Company; of the charges and expenses attending the *making, maintaining, and carrying on the undertaking;* and of all other the receipts and expenditure of the Company up to the period of making the account." The materials for making up this account must be in the possession of the Company: and, although they are not required to produce either to the overseers, it is manifestly their interest to do so, because out of them is to arise the evidence on which the claim for deductions must be supported; and if they will not afford the information necessary for these being duly made, they must expect that any Court of justice will presume against them. It is but fair to intend that the evidence which they withhold would not, if produced, have warranted greater deductions than those already made.

There is, moreover, the further substantial consideration, that in all litigation, even if successful, they must, as considerable ratepayers, at all events, contribute very largely to their opponents' expenses. These circumstances, it cannot be doubted, will have their practical weight.

On these broad principles, therefore, that the statute provides but one rule, and intends to secure uniformity;

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that we have no power to substitute another; that the decisions hitherto are consistent; and that there is no insuperable difficulty in the practical working of the rule; we are of opinion that the respondents are right in their principle of assessment, and that upon this point our judgment must be for them.

We may observe, that by the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 107, railway Companies within its operation are bound to make up annually an account shewing the total receipts and expenditure under the several distinct heads, and transmit a copy to the overseers of every parish through which their lines pass.

The *second* question submitted to us is on the right to a deduction from the rateable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of the assessment. As a general principle, we do not understand the respondents to deny that a deduction for the purpose here stated is proper to be made; the objection which they raise to the particular claim of the Company, is founded on two circumstances:

First, that the proper provision is already made under a head called "working expenses;" to which we do not agree.

Secondly, that if more may be at any time necessary, the necessity has not yet arisen, because the Company have not yet incurred the expense, nor laid by from their receipts any sum to meet it when it shall arise.

This question, under nearly the same circumstances, came before the Court in the case of *Reg.* v. *The Great Western Railway Company* (*a*), and was decided against the Company; but we are desired to review that decision. We there said, that we thought such an expense, as distinct from mere annual repair, fell under the same principle, and was an unobjectionable head of deduction, when it should either

(*a*) Ante, Vol. 4, p. 28; 6 Q. B. 179.

be actually incurred or provided for; but we thought, that as no allowance would be made for annual repairs in any year in which no repairs took place, so none should be made for this annual depreciation in value, unless at least there were funds set aside to meet it when it should be thought expedient to do the work of renewal. In that case, too, there was a further circumstance which had some influence on our judgment, and which is not found here—that whatever expense had been in fact incurred, the Company had chosen, rightly or wrongly, at all events conclusively on themselves, to make a charge on their capital, and not on their receipts, converting it, therefore, into landlord's improvements, rather than tenant's repairs.

The difficulty which we now feel arises from the same fact, that no charge has, either by way of outlay or setting apart, been made on the Company's receipts. If the depreciation be, as probably it is, both certain and capable of an annual average, though not proper to be in fact repaired annually, we think it should be met by laying by a certain sum annually; and that if the Company, in order to swell their dividend, or for any other motive, neglect to do so, they act unlawfully in one of two ways: either they make a dividend which in substance impairs their capital, because they throw a burden on the latter which ought to be deducted from the former, (and this is in violation of the 193rd section of their Act), or they cast the whole burthen of a heavy restoration of the permanent way on the dividend of some future year, to the manifest injury of the then proprietors, and for the unfair benefit of the present body. In such case, too, there may possibly arise some difficulty in resisting the claim to be allowed the whole deduction from the rate of the year in which the expense shall be actually incurred; although it would be manifestly unjust to allow it twice over, first in detail annually, and then in the lump.

This difficulty was met in the argument by instancing

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the ordinary case of house property, as to which a larger difference is made between "gross estimated rental" and "rateable value" than in the case of land, on account of this very annual depreciation of the thing itself, and the necessary prospective restoration; and yet, it was said, you never inquired whether the owner did in fact lay by a portion of his annual rent to meet that distant expense.

We have considered this question with much attention, and upon the whole we think that the Company are entitled to a deduction on this head. We cannot make a substantial distinction between this and house property, or any other of a perishable nature, which must require renewal. And, although we think that the Company ought to set apart the sum which they claim to deduct, we cannot compel them to do so in this indirect way; and we think, that whenever the time shall come for actually making the restoration, they will be estopped from claiming more than that annual deduction which they now insist on, exactly as a landlord could not claim to deduct the expense of restoration made by him of a house. The rate, therefore, will be amended by a reduction according to the calculation made by the sessions in this respect.

The *third* question arises on what is called the exchange toll. The substance of the transaction between the appellants and the South Eastern Company, out of which this arises, appears to be this—that the traffic of the latter is to pass free over a certain portion of the line of the former, in consideration of the traffic of the former passing free over a certain portion of the line of the latter. A certain distance, between two and three miles, of the appellants' line, within the parish of Croydon, is affected by this arrangement. We think that the sessions rightly decided this to be rent in kind earned by this land; it seems to us exactly the same in substance as if so many tickets were daily issued, without money paid for them, to the South Eastern Company, in return for so many received from them; the tickets mu-

tually transferred would on either side represent so much money earned. But then we think these earnings must be subject to exactly the same deductions as if they were received in money. The rate, therefore, will in this respect be amended according to the principle now laid down.

The only remaining point in this case turns upon the narrow question, from what date the overseers ought to make their calculations as to the assessment on the Company. The date of the rate is the 20th November, 1847; and as regards the Company, it is based on a half-yearly statement published by them on the 10th August, but made up only to the 30th June preceding. In the interval between the 30th June and the 20th November the value of the working plant of the Company had been (as the sessions have found) not improperly increased from 260,000*l.* to 350,000*l.* The deduction on this outgoing the Company claim to be entitled to, and we think they are entitled to it. If this allowance had been attended with the consequence of quashing the rate, we should have been of a different opinion; but, as the rate may be amended, the sessions ought to avail themselves of every light that can be afforded them, down to the latest period antecedent to the actual making of the rate, in order to bring it to the greatest possible accuracy. The overseers, in making a prospective rate, are to make it on the supposed prospective value, ascertained by them, as well as they can, from the latest evidence in their power as to antecedent value: it cannot be required of them that the assumed value and the actual value should correspond with perfectly minute accuracy; and they were quite justified in making their rate on the latest published account, if that was the latest imformation they had, or could be reasonably expected to procure; and we should not think a rate ought to be quashed where this had been done: but if the Company had communicated to them this new fact before the rate was made, no doubt they

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ought to have taken it into account if they believed it; and if they did not, and on appeal the Company had satisfied the sessions of the fact, the appeal ought to have succeeded. So now, and equally, we think, if the sessions are put in possession of a fact which existed before the rate was made, as it is not the absolute duty of the Company to volunteer information, if the fact will have the effect of reducing the assessment and approximating it more nearly to actual accuracy, they should amend the rate accordingly.

We have now disposed of all the questions of principle raised in this case; the sums and quantities the parties will have no difficulty in settling according to the statements in the case.

In *Reg.* v. *The London, Brighton, and South Coast Railway Company*, and in *Reg.* v. *The South Eastern Railway Company*—Rate to be amended.

In *Reg.* v. *The Midland Railway Company*—Order of sessions and rate quashed.

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Hilary Term, 1850.

THE QUEEN, on the Prosecution of THE TRUSTEES OF THE ROTHERHITHE ROADS, *v.* RIGBY and Others.

Jan. 16*th.*

THIS was an indictment for obstructing a carriage turnpike-road in the parish of St. Paul, Deptford. The first count stated, that the defendants, in, upon, over, and across a Queen's common highway for carriages, erected and built and continued a bridge, whereby the said highway was narrowed, obstructed, and straitened, &c. The second count stated, that the defendants placed and continued a certain erection of brickwork across the said highway, whereby it was narrowed and obstructed. The third count stated, that the defendant placed large quantities of bricks, mortar, &c., on the said highway, and kept them there. The fourth and fifth counts stated, that the defendants dug a hole and pit in the road, and continued it there. And the last count

By 9 & 10 Vict. c. ccxxxiv. it is provided, "that, in every case in which the railway shall cross the road otherwise than at right angles, the bridges shall be made with skew arches, so as not in any manner to alter the direction of or interfere with the line of the said roads, or the footpaths to the same."

By 8 Vict. c. 20, s. 49, it is provided, that of every bridge to be built for the purpose of carrying a railway over a turnpike road, the width of the arch shall be such as to leave thereunder a clear space of thirty-five feet; provided (sect. 51) that, where the average available width for the passage of carriages is less than that width, the width of the bridges need not be greater than such average available width, but so as not to be less than twenty feet. Provided, that, if the average available width of the road be afterwards increased, the railway Company shall increase the width of the bridge, if required, to an extent not exceeding the width of the road so widened, or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway.

On an indictment for a nuisance to a highway for carriages, by building on it the piers of a railway bridge, and narrowing it, it appeared, that the piers of the bridge stood on the footpath on each side; that they were built parallel to the line of carriage road, not directly opposite each other, as the bridge was a skew arch; and that the carriage road remained as it was before, twenty-eight feet wide; but that the footpaths were each narrowed:—*Held*, first, that the object of the above section of the private Act was to prevent the railway Company from turning or bending the road so as to carry it at right angles under any bridge over which the railway passed, and again turning it back on the other side of the bridge to its former direction and line; but that the section did not affect any question as to the width of the bridge or the narrowing of the road. Secondly, that the meaning of the General Act was, that where the average available width for the *passage of carriages* on any road exceeded thirty-five feet, it might be narrowed to thirty-five feet under the arch; where it was less, the arch might be of the same width as the road, so as it was not less than twenty-feet; and if the road was afterwards widened, the arch must be proportionably widened up to but not beyond thirty-five feet. Thirdly, that the footpaths were not to be taken as part of the turnpike road over which the arch of the bridge was to be thrown, within the meaning of the above Acts of Parliament. And, lastly, that the obstruction to foot-passengers only was not forbidden by the above Acts of Parliament.

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stated, that the defendants dug up and subverted a part of the earth and soil of the said highway, and erected and built certain piers, walls, &c., and continued the same there.

Plea, not guilty.

The indictment was tried before Lord *Denman*, C. J., at the Maidstone Spring Assizes, 1848, when the defendants were found guilty, subject to the opinion of this Court on the following case:—

By 6 & 7 Vict. c. cviii. (local and personal, public), certain trustees of the Bermondsey, Rotherhithe, and Deptford roads, were appointed; and, by sect. 8 of that Act, certain roads are described, for the improving, maintaining, and keeping in repair of which it is enacted, that the said Act shall be put in execution. [Sections 1, 2, 3, 16, 46, 49, and 51 (*a*) of the Railways Clauses Consolidation Act, 1845, (8 Vict. c. 20,) were then set out.]

By 9 & 10 Vict. c. ccxxxiv., the London and Croy-

(*a*) Sect. 49. provides that "Every bridge to be erected for the purpose of carrying the railway over any road shall (except where otherwise provided by the special Act) be built in conformity with the following regulations: (that is to say)—The width of the arch shall be such as to leave thereunder a clear space of not less than thirty-five feet, if the arch be over a turnpike road, and of twenty-five feet if over a public carriage road, and of twelve feet if over a private road."

Sect. 51 provides, "That in all cases where the average available width for the passage of carriages of any existing roads, within fifty yards of the points of crossing, the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than twenty feet; provided also, that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the Company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway."

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don Railway Company were empowered to make a branch railway, to commence by a junction with the London and Croydon Railway, in the parish of St. Paul, Deptford, passing, &c., through the parish of St. Paul, Deptford, together with all proper works and conveniences connected therewith, and approaches thereto. The line of such proposed branch railway crossed a turnpike-road, called the Lower Deptford Road, which was one of the roads under the jurisdiction of the said trustees, and was the road in question in this case. This road is a public highway, and has been used as such by the public for upwards of forty years continuously, before and up to the time of the excavations hereinafter mentioned. Previously to an application being made to Parliament to enable the construction of such proposed branch railway, the plans and sections of the same, and the book of reference thereto, were deposited with the respective clerks of the peace for the counties of Kent and Surrey, as required by the Standing Orders of both Houses of Parliament; and a notice, as required by such Standing Orders, was served upon the said trustees. [The notice was then set out.] Subsequently to such notice, a bill was brought into Parliament for the purpose of enabling the said railway Company to construct such branch railway; and the said trustees appeared before the committee of the House of Commons, and opposed the bill. And the said committee permitted the introduction into the said bill of certain clauses proposed by the trustees (sects. 18 and 19 (*a*)), but refused to allow the insertion of

(*a*) Sect. 18. "That the said railway shall be carried over Trudley-lane, at the expense of the said Company, by means of a bridge, of the width of at least thirty feet, with a square soffit, and with a side arch for the foot-path of the width of at least six feet, separated from the said arch by pillars; and the centre arch of the said bridge, over Trudley-lane, shall be of a height, from the present surface of Trudley-lane to the centre of the soffit of such arch, of not less than thirty feet, six inches; and the side arch of the same bridge shall be of a height not less than ten feet."

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any special provisions as to the form and dimensions of the bridge by which the said railway was to be carried over the said Lower Deptford Road. Under these circumstances the bill was passed.

By 9 & 10 Vict. c. ccxxxiii. (local and personal, public,) the London and Brighton and the London and Croydon Railway Companies were consolidated and incorporated as one Company, by the name of "The London, Brighton, and South Coast Railway Company;" and, by section 27, the new Company is invested with all the powers to make branches and extensions which had been or should be granted to either of the two Companies so consolidated. The line of the said branch railway crosses the Lower Deptford Road otherwise than at right angles, by means of a bridge with skew arches, at a point in the parish of St. Paul, Deptford, in the county of Kent. The average width of the carriage-way of the said road, at the said points of crossing, and for fifty yards on either side of the same, had been, for upwards of forty years immediately before the making of the excavations and building the piers mentioned, and still is, twenty-eight feet, and the average width of the footpaths on the east side of such part of the said carriage-way had been, for upwards of forty years immediately before the making of the excavations and building the said piers, seven feet three inches, and, on the west side thereof, eight feet three inches, the average width of such part of the said road, during such last-mentioned period, including both the said footpaths, being forty-three feet six inches. On the 20th of August, 1847, the defendants, acting under the authority of the Company,

Sect. 19. "That in every case in which the said railway shall cross any of the roads under the jurisdiction of the said trustees otherwise than at right angles, the bridge over the same shall be built with skew arches, so as not in any manner to alter the direction of, or interfere with the line of, the said roads or the footpaths to the same."

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and for the purpose of building the bridge mentioned over the said road, as the same is described in the plans and sections, &c., excavated portions of the footpaths on both sides of the said road, at the above-mentioned point, in a direction parallel to the line of the said road and footpaths, to the extent of four feet out of the footpath on one side, and to the width of four feet on the other; and the said excavations were continued for some days, and were six feet deep. The clear width of road and footpaths, taken together, which was left between the edges of such two excavations, (measured in a line at right angles with the edges of such excavations,) was thirty-six feet. The defendants afterwards filled up the said excavations with brickwork, and proceeded to erect piers for a certain bridge, by which the said branch railway was to be carried over the said road. When the works had proceeded until the foundations of the piers were level with the surface of the said footpaths, the trustees filed a bill in Chancery for an injunction against the railway Company, to restrain them from erecting the said bridge on the said foundations, and also from permitting the said footpaths to be diminished in width, or obstructed by the said excavations made therein, or by the foundation of the said piers, or by the said piers, and from building any other arch over the said road, at the place so marked out for the passing of the said railway over the same, other than a skew arch. An ex parte injunction was accordingly obtained by the trustees; and on a motion made to dissolve the injunction, the motion was ordered to stand over, with liberty to the plaintiffs to take such proceedings at law against the defendants as they should be advised, and the defendants to be at liberty, in the meantime, to construct the arch as they proposed; and under this order the present indictment had been preferred by the trustees. The said road was never entirely closed, in consequence of the said excavations, or during the building of the said piers and bridge; and the traffic along the said

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road (except that part of it on which the said piers were so erected) continued as before the building of the said bridge. By the building of these piers each of the said footpaths was narrowed to the extent aforesaid, and the piers have been ever since continued and are respectively seventeen feet in height and thirty-five feet in width, in a direction parallel to the line of the said road and footpaths; and afterwards the defendants built the said bridge on the said piers, and continued the same so erected hitherto, and the said bridge is built with a flat skew arch, so as not in any manner to alter the direction of, or interfere with, the line of the said road or the footpaths to the same, except so far as the facts herein stated constitute any such alteration or interference. The said road is still narrowed and obstructed by the said bridge and piers to the extent aforesaid. The clear space under the said bridge, measured in the direction of the line of the arch and of the said railway, is thirty-seven feet eight inches, and the clear space under the said bridge, measuring in a line at right angles with the face of the said piers, is thirty-six feet, and the height of the said bridge to the soffit thereof is seventeen feet. The width of the footpath now left on each side of the said road is (having regard to the traffic on the said footpaths) too narrow for the free passage of persons on foot along the said footpaths; and if the same were to be widened by adding to them a portion of the said carriage-way, the said carriage-way would be rendered too narrow for the free passage of horses and carriages, having regard to the number of horses and carriages daily passing along the said carriage-way. The pleadings upon the said indictment were to be taken as part of this case.

The question for the opinion of the Court is, whether the defendants are guilty or not of all or any of the nuisances in the respective counts of the indictment charged against them; and if the Court shall be of opinion that they are so guilty, then the verdict is to be entered for the Crown; and if the Court shall be of opinion that they

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are not guilty, then the verdict is to be entered for the defendants.

Sir *F. Thessiger*, in support of the conviction (*a*).—The footpath being made part of the road by sect. 68 of the Turnpike Act (*b*), the Company were not authorised in lessening its width. The Railways Clauses Consolidation Act (*c*) requires, where a bridge is to be erected for the purpose of carrying a railway over a road, that the width of such arch should be such as to leave thereunder a clear space of not less than thirty-five feet. The 51st section applies where the average available width of an existing road is less than the width thereinbefore prescribed for bridges, that is thirty-five feet, in which case the bridge need not be greater than such average available width, so that it be not, in the case of a turnpike road, less than twenty feet. On this point he cited *Attorney-General* v. *London and Southampton Railway Company* (*d*); *Reg.* v. *Birmingham and Gloucester Railway Company* (*e*); *Reg.* v. *London and Birmingham Railway Company* (*f*).

The true construction of the 19th section of the special Act is, that the footpaths shall not be interfered with, and it cannot be confined to the *line* of the footpath. The 18th section (*g*) shews that the legislature had in view the preservation of the footpaths, and if so the case falls within the purview of the special Act; but if the construction of the defendants be correct, still, by building a pier projecting into the footpath, the *line* of the footpath is interfered with.

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., and *Erle*, J.

(*b*) Which enacts, "That all and every the footpaths on the sides of or adjoining to the said roads shall be, and the same are hereby declared to be, subject to the regulations of the Act, and to be part of the said roads."

(*c*) 8 Vict. c. 20, s. 49, see ante, p. 480.

(*d*) Ante, Vol. 1, p. 302; *S. C.*, 9 Sim. 78.

(*e*) Ante, Vol. 2, p. 694; *S. C.*, 2 Q. B. 47.

(*f*) Ante, Vol. 1, p. 317.

(*g*) See ante, p. 481.

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The *Attorney-General* (Sir *John Jervis*) contra.—The arch being thirty-six feet broad, measuring at right angles across the road, is a sufficient compliance with the Acts of Parliament. The 18th section of the special Act expressly provides for a deviation from the plans and sections; and the 19th section applies only to the line or direction of the footpaths; none of the sections apply to an obstruction of a footway; and it is clear that the piers do not interfere with the *line* of the footway. The 68th section of the trustees' Act treat the carriage-road and footway as one. [He referred to *Attorney-General* v. *Southampton Railway Company* (*a*), and *Reg.* v. *Birmingham and Gloucester Railway Company* (*b*).]

Sir *F. Thessiger* replied.

Cur. adv. vult.

PATTESON, J.—This was an indictment for a nuisance to a turnpike road, by building on it the piers of a railway bridge, and narrowing it by such building. All the counts of the indictment charge the nuisance to be to the carriage-road; nothing is said about a foot-road throughout. For forty years before the building of the bridge, the average width of the carriage-road, for fifty yards on each side of the spot where the bridge is now erected, was twenty-eight feet, and the footpath on one side was eight feet three inches, and on the other, seven feet three inches. The piers of the bridge stand on the footpath on each side; they are each four feet wide, and are built parallel to the line of the carriage-road, not directly opposite to each other, as the bridge is a skew arch. The effect is, that the carriage-road remains as it was before, twenty-eight feet wide, but the footpaths are each narrowed; and the carriage-road and footpaths together, which formerly were forty-three feet six inches, are now only thirty-six feet. These are the dimensions stated in the case; but if the piers occupy eight feet, it would follow that the total width is only thirty-five

(*a*) Ante, Vol. 1, p. 302; *S. C.*, 9 Sim. 78. (*b*) Ante, Vol. 1, p. 317.

feet six inches. Whether the difference of six inches could be accounted for by the circumstance of the piers not being directly opposite to each other does not appear, but we do not think it material to our decision. The prosecutors relied much on the 19th section of the special local Act (9 & 10 Vict. c. ccxxxiv.), which provides, "That in every case in which the railway shall cross the roads otherwise than at right angles, the bridges shall be made with skew arches, so as not in any manner to alter the direction of, or interfere with, the line of the said roads or the footpaths to the same." The object of this section is plain; namely, to prevent the railway Company from turning or bending the road, so as to carry it at right angles under any bridge over which the railway passes, and again turning or bending it back on the other side of the bridge to its former direction and line; but the section does not touch or affect any question as to the width of the bridge, or the narrowing of the road. The railway Company have complied with the section by erecting a skew bridge.

The question in this case then depends upon the construction of the 8 Vict. c. 20, the Railways Clauses Consolidation Act, 1845. Now, by that Act it is provided, that there shall be a clear space of thirty-five feet if the arch be over a turnpike road; provided that where the average available width for the passage of carriages is less than the width thereinbefore prescribed, the width of the bridges need not be greater than such average available width, but so as not to be less in the case of a turnpike road than twenty feet. It is further provided, that if the average available width of the road be afterwards increased, the railway Company shall increase the width of their bridge, if required, to an extent not exceeding the width of the road so widened, "or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway."

Much discussion took place on the argument as to the

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word "maximum," but the meaning of the legislature is very plain. Where the average available width for the passage of carriages on any road exceeds thirty-five feet, it may be narrowed to thirty-five feet under the arch, for the arch is only required to be of that width; where it is less, the arch may be of the same width as the road, so as it be not less than twenty feet; and if the road be afterwards widened, the arch must be proportionably widened up to, but not beyond, thirty-five feet. In the present case, the average available width of the road for the passage of carriages is the same as it was before the erection of the bridge, and the arch is of the same width, and exceeds twenty feet, and the road has not been widened so as to call on the railway Company to widen the arch. Therefore, the provisions of the Railways Clauses Consolidation Act appear to have been complied with. No mention is made in that Act of footways, as distinguished from the road for the passage of carriages. If they are to be taken as part of the turnpike road, then the road has been narrowed from forty-three feet six inches to thirty-six feet, and the arch of the bridge is only twenty-eight feet instead of thirty-five. We think, however, that the footpaths cannot be taken as part of the turnpike road, over which the arch of the bridge was to be thrown, within the meaning of these Acts of Parliament. There is no pretence for saying that they can be taken into account in ascertaining the average available width of the road for the passage of carriages; and as that width has been preserved as it was before, in strict conformity with the Acts of Parliament, it is not true to assert, as every one of the counts in this indictment does, that persons cannot pass with their carriages as they used to do. The obstruction is to foot passengers only, which is not forbidden by the Acts, neither is it charged as the nuisance complained of by this indictment. The cases cited in argument are wholly inapplicable to this indictment. Upon the whole, we are of opinion that a general verdict of not guilty must be entered.

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THE QUEEN on the Prosecution of THE LLANELLY RAILWAY AND DOCK COMPANY *v.* THE SOUTH WALES RAILWAY COMPANY. *Feb. 26th.*

MANDAMUS.—The writ recited, that, by the 8 & 9 Vict. c. cxc. (incorporating the Companies Clauses, Lands Clauses, and Railways Clauses Consolidation Acts) the South Wales Railway Company were empowered to construct a railway according to the plans, &c. deposited; and that, by the Acts authorising the construction of the Llanelly Railway and Dock, that Company were empowered to hold lands for the purpose of constructing a railway, dock, and other works, which they had done; and that the Llanelly Company held certain pieces of land which were inserted in the plans of the said South Wales Railway Company, and which were required for the purposes of constructing their line of railway. That the South Wales Railway Company duly served upon the said Llanelly Company a notice that they required to purchase and take part of the said pieces or parcels of land in the said notice mentioned, being lands which by the said South Wales Railway Act, 1845, and the Acts incorporated therewith, the said South Wales Railway Company were authorised to purchase and take; and that the said South Wales Railway Company were willing to treat for the purchase thereof, and as to the compensation for damage to be sustained; and that upon the treaty, pursuant to such notice, the said Llanelly Company and the said South Wales Railway Company failed to agree, and still do not agree, as to the amount of the compensation to be paid by the said South Wales Railway Company, for the interest in such lands belonging to and held and owned by the said Llanelly Railway Company, in such notice mentioned and described as aforesaid, or for the damage that might be sustained by the

The South Wales Railway Company having power to cross the L. Railway, included in their deposited plans and book of reference certain lands on which the L. Railway was constructed, and gave notice to the L. Company that they required to purchase such lands for the purposes of their railway. The South Wales Railway Company had no power to purchase, nor had the L. Company to sell, any part of their actual line:—*Held*, that a mandamus could not be sustained requiring the South Wales Railway Company to issue their warrant to the sheriff to summon a jury to assess compensation for the purchase of the land on which the L. line was constructed.

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said last-mentioned Company, by reason of the execution of the works of the said South Wales Railway Company; that the compensation claimed by the said Llanelly Company in respect of the land so required to be purchased and taken by the said South Wales Railway Company exceeded the sum of 50*l.*; that the said South Wales Railway Company were duly required by and on behalf of the said Llanelly Company to issue their warrant to the sheriff of the county of Carmarthen, requiring him to summon a jury under the provisions of the Lands Clauses Consolidation Act, 1845, to assess the amount of purchase and compensation monies as aforesaid, to be paid by them the said South Wales Railway Company to the said Llanelly Company, in respect of the said parts of the said parcels of land; that no agreement had yet been made by the said Llanelly Company with the said South Wales Railway Company as to the sums of money to be by them paid to the said Llanelly Company, for such purchase or compensation as aforesaid, in respect of the said lands, or of any or either of them, or any part thereof; and that the said South Wales Railway Company had wholly neglected and refused to issue a warrant to the sheriff of the said county of Carmarthen, for the purposes in that behalf aforesaid. The writ then commanded the South Wales Railway Company to issue their warrant to the said sheriff to summon a jury to assess compensation for the pieces of land specified in the said notice.

The return stated, that a portion of the land specified in the notice mentioned in the writ formed part of the actual line of railway constructed by the said Llanelly Company under their Acts; and that by the said Acts the railway thereby authorised was appropriated to the use of the public, upon payment of certain rates; and that neither the said Llanelly Company, nor any person or persons on their behalf, were or was, at the time of the issuing of the said writ, enabled or capable, by any of the Acts of Parliament in the said writ mentioned, or in any other manner, to sell, convey,

release, or dispose of the whole or any part of the said land, forming part of the actual line of the said railway, and whereon the said railway was and is so actually constructed as aforesaid; that the defendants had always been ready to issue their warrant to the sheriff of the county of Carmarthen, requiring him to summon a jury, under the provisions of the Lands Clauses Consolidation Act, 1845, to assess the amount of purchase and compensation monies to be paid by them to the Llanelly Company, for the purchase of and compensation for and in respect of all the residue of the said parts of the said pieces or parcels of land referred to in the said notice, (that is to say), for and in respect of so much of the said pieces or parcels of land as does not form part of the actual line of the said railway so as aforesaid made and constructed by the said Llanelly Company, and whereon the said railway is not actually constructed as aforesaid, together with the amount of all other compensation to which the said Llanelly Company are or may be otherwise entitled in respect of the said parts referred to in the said notice, save and except the compensation claimed by them for the purchase of so much of the said parts of the said pieces or parcels of land respectively, as now forms part of the actual line of the said railway, and whereon the said railway is actually constructed.

The prosecutors' points were, that, under the special Acts in the writ and return mentioned and the Lands Clauses Consolidation Act, the South Wales Railway Company had power to purchase, and the Llanelly Railway and Dock Company had power to sell the lands in question; and that, even if it were otherwise, an alleged incapacity in the prosecutors to make a title was no sufficient answer to the return to the mandamus.

The defendants' points were, that they had not under any of the Acts power to purchase, nor had the Llanelly Railway and Dock Company power to sell the land, in respect of which the South Wales Railway Company were

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required to cause the purchase-money to be assessed; that the Llanelly Railway and Dock Company were not, under the circumstances stated in the return, entitled to call upon the South Wales Railway Company to issue a precept for the purpose of having the purchase-money assessed for that part of the land which formed part of the existing railway of the said Llanelly Dock and Railway Company, but was in respect thereof only entitled to receive such compensation-money as a jury might award for the injury to be by them sustained by reason of the said intended South Wales Railway crossing or damaging or interfering with the same. That the defendants ought not to be called upon to issue a precept in the terms or to the effect suggested by the writ, or any precept requiring a jury to assess the amount of money payable by them for purchasing for the use of their intended railway land which forms an integral part of another public railway, and was not by law applicable to the purposes of the said intended South Wales Railway.

Greenwood, for the prosecutors(*a*).—The return is insufficient; it is no answer that there is a public way over the land which the Company have given notice of their intention to take. If this had been a public footway, then there could be no doubt that the Act would enable the Company to take the lands mentioned in the plans and book of reference. [*Coleridge*, J.—That is, if the owners can sell. If infants, or others under disabilities, were not expressly named, the Company could not, under the general words, take their lands.] The Llanelly Company may, it is submitted, sell subject to the right of way of the public. [*Coleridge*, J.—But that is very different from enabling the Company to sell the land on which the railway is formed.] The

(*a*) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., and *Wightman*, J.

16th section of the 8 Vict. c. 20, assumes that railways may cross public ways, and the legislature must be presumed to have authorised the consequences: *Rex* v. *Pease* (*a*). [He referred to 9 & 10 Vict. c. ccxxxix. s. 14, and 8 Vict. c. 20, s. 53.]

Watson, contrà.—Though the South Wales Company may have power to cross the prosecutors' line, they have no power to purchase it; and their remedy is under the Lands Clauses Consolidation Act, for damage occasioned by the execution of the works; nor have the Llanelly Company power to sell their line, the public having acquired a right in it: *Rex* v. *Severn and Wye Railway Company* (*b*); and the effect of the Acts is, that the Llanelly Company have the freehold in the land, with a right of passage in the South Wales Company over that land, doing no injury to the existing rights of the public.

Greenwood, in reply.

Cur. adv. vult.

PATTESON, J.—The sole question raised in this case is, whether the South Wales Railway Company, having power to cross the Llanelly Railway and Dock Company's line, are bound to purchase the soil on which the latter railway is actually constructed at the point of crossing, or only the lands on each side of that railway. Much discussion took place as to the right of the South Wales Railway Company to cross the other line on a level. We do not find any authority so to do either in the Railways Clauses Consolidation Act (8 Vict. c. 20), or the Lands Clauses Consolidation Act (8 Vict. c. 18), or in any other public general Act, or in the special Acts relating to either of these railways. But if any such right existed, we cannot find any clause which authorises the Llanelly Company to sell, or

(*a*) 4 B. & Ad. 30. (*b*) 2 B. & Ald. 646.

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the South Wales Railway Company to purchase, any part of the actual line of the Llanelly Railway. The writ of mandamus states that the closes there described are mentioned in the book of reference and plans referred to in the South Wales Railway Company's Acts, 8 & 9 Vict. c. cxc., and 9 & 10 Vict. c. ccxxxix.; that the South Wales Railway Company had given notice to purchase parts of those closes; and that the parties, disagreeing as to the price, had refused to summon a jury; and calls on them so to do. The return states that parts of these closes constitute the actual line of the Llanelly Railway; that they have been always ready to summon a jury to assess the price of the residue of the closes and the damage which would be sustained to the Llanelly Railway Company by the South Wales Railway Company crossing their line at such parts of the closes as constitute their actual line; but that they cannot summon a jury to assess the price of those parts, since neither the one party can by law sell nor the other purchase such parts. We think that they are right in their construction of the law, and that they have shewn by their return that they have been and are ready to do all that by law they can be required to do. Judgment must therefore be for the defendants.

COURT OF EXCHEQUER.

Hilary Term, 1851.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* M'MICHAEL. *Feb.* 10*th*.

DEBT for calls.—The declaration was in the statutory form, and was for 112*l.* 10*s.* due for six calls upon ten shares in the Company, of which the defendant was the holder.

There is no legal objection to a call being made payable by instalments.

Plea, never indebted.

The cause was tried at the Liverpool Summer Assizes, 1850, before *Cresswell*, J.; when it appeared, that the defendant was the holder of ten shares in the Company, and was properly on the sealed register. In order to prove the fifth call, the following resolution of the directors, made on the 9th of June, 1848, was put in evidence:—"Resolved, that a call of 2*l.* 10*s.* upon every registered share be, and the same is hereby made and ordered to be, paid to any of the following bankers at the under-mentioned times and places, that is to say, 1*l.* 5*s.* per share on the 17th July next, and 1*l.* 5*s.* per share on the 16th September next." [Here followed a list of bankers, &c.]

The sixth call was made on the 27th December, 1848, by a resolution of the directors, in a similar form, and was also payable by instalments. The action was commenced subsequently to the day appointed for the payment of the last instalment.

At the trial it was objected, on the authority of *The Ambergate, &c. Railway Company* v. *Coulthard* (*a*), that the fifth and sixth calls were bad by reason of their being payable by instalments; but his Lordship overruled the objection, and directed a verdict for the plaintiffs for the amount claimed, giving the defendant leave to move to re-

(*a*) Ante, p. 218; *S. C.*, 5 Exch. 459; 19 L. J., N. S., Exch., 311.

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duce the verdict by the amount of the fifth and sixth calls, 50*l.* and interest.

Cleasby having accordingly, in Michaelmas Term last, obtained a rule nisi,

Willes and *Hugh Hill* now shewed cause (*a*).—There is no clause in the special Act limiting the powers of the directors to make calls, nor is there any prescribed period within which successive calls cannot be made; the directors, therefore, might have called up all their capital in one day. This circumstance may vary the case from *The Ambergate, &c. Railway Company* v. *Coulthard* (*b*). In that case all the instalments were not due at the time of the commencement of the action; and what the Court really decided was, that debt would not lie until the last instalment was payable. This case has in truth been decided by *The Architects' Company* v. *Wilson* (*c*). [*Alderson*, B.—If a call be payable by instalments, can a shareholder, after the making of the call and before the last instalment is payable, transfer his share. If he cannot, that would be an inconvenience; for the calls might be made payable at times spreading over several years, during which no transfer could be made. If he can, then the transferree would not be liable for the call, because he would not have been a shareholder at the time the call was made. *Parke*, B.—If, by making a call payable at different times there might be an interval during which the shares could not be transferred, that would be an inconvenience.] But there can be no such interval, because the shareholder may at any time pay the amount of the call, and then transfer his share; the directors would be bound to accept the amount of the call though not payable (*d*). The resolution is the call: *Ex parte Tooke, in re The Londonderry, &c. Railway Company* (*e*); and

(*a*) Before *Parke*, B., *Alderson*, B., *Platt*, B., and *Martin*, B.

(*b*) Ante, p. 218; *S. C.*, 5 Exch. 459; 19 L. J., N. S., Exch., 311.

(*c*) Q. B., 4 Nov. 1850; see 16 Law Times, 124.

(*d*) See 8 Vict. c. 16, ss. 23 and 24.

(*e*) Ante, p. 1; *S. C.*, 18 L. J., N. S., Q. B., 343.

this is in truth one call payable at different times in ease of the shareholders. [*Parke*, B.—When, then, would a forfeiture be incurred by non-payment?] On non-payment of the last instalment. [They referred to *Macey* v. *Shurmer* (*a*), *Spring* v. *Biles* (*b*), *Lawrence* v. *Wynn* (*c*), Sugd. V. & P. p. 562.]

Cleasby, contrà.—The power to make calls is a statutable authority; and unless it be strictly complied with, the call cannot be enforced. A "call" is an entire thing, it means a sum of money payable at one time; and all the clauses of the Companies Clauses Consolidation Act (*d*) contemplate one period for payment. The directors are "from time to time (*e*)" to make calls. Twenty-one days' notice "of each call (*f*)" is to be given. If, "*on the day* appointed for payment (*g*)" of the call, the shareholders do not pay the amount, then they are liable to pay interest. So, if, on "the *day* appointed for payment of such call (*h*)," the shareholder fails to pay it, the share is liable to forfeiture; so that the legislature has fixed one period at which the rights and liabilities of the shareholders are to attach. There is no obligation in the shareholder to pay until a time and place for payment of *the call* has been fixed (*i*). When can it be said, in this case, that the obligation arose? Not on the non-payment of the first instalment, because *the call* was not payable; nor on non-payment of the second instalment, for the same reason. But this case must be governed by the case of *The Ambergate &c. Railway Company* v. *Coulthard*. [*Martin*, B.—There appears to be some misconception as to that case. The Court never decided that a call payable by instalments was bad (*j*), but only that debt would not

(*a*) 1 Atk. 389.
(*b*) 1 T. R. 435, n.
(*c*) 5 M. & W. 355.
(*d*) 8 Vict. c. 16.
(*e*) 8 Vict. c. 16, s. 22.
(*f*) Sect. 22.
(*g*) Sect. 23.
(*h*) Sect. 29.
(*i*) See sects. 21 and 22.
(*j*) But see ante, p. 218; 5 Exch. 459; 19 L. J., N. S., Exch., 311; 14 Jur. 626.

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lie until all the instalments were due.] Certainly the Reports go further than that. Besides, the legislature intended that the directors should not be able to anticipate the funds of the Company. [He cited *The Stratford and Moreton Railway Company* v. *Stratton* (*a*).]

PARKE, B.—We will hear the next case, which turns upon the same point, before we give judgment.

(*a*) 2 B. & Ad. 518.

Feb. 11*th*.

BIRKENHEAD, LANCASHIRE AND CHESHIRE JUNCTION RAILWAY COMPANY *v.* WEBSTER.

For the marginal note, *see* last case.

DEBT for calls.—Plea (inter alia) never indebted.

This cause was tried before *Parke*, B., at the Chester Summer Assizes, 1850, when it was proved, that the defendant was a holder of 200 shares in the Company, and was on the sealed register of the Company at the time of making the call; that the following notice was sent to him; and that a resolution of the directors, that a call of 10*l.* be made, payable by instalments, as stated in that notice, was duly made.

"Birkenhead, 10th February, 1849.

"Sir,—In pursuance of a resolution of the Board of Directors, you are requested to pay a call of 10*l.* per share on the Birkenhead, Lancashire, and Cheshire Junction 31*l.* shares, now registered in your name, in the following sums, viz.—5*l.* per share, part of the said call of 10*l.* per share, on the 16th day of March, 1849; and 5*l.* per share, the remainder of the said call of 10*l.* per share, on the 16th day of April, 1849, to one of the undermentioned bankers, viz. &c.

"The bankers are directed to charge interest at the rate of

5*l.* per cent. per annum on the instalments of the said call of 10*l.* per share unpaid after the above-mentioned dates.

"The Company will receive payments in advance of calls, upon which interest at the rate of 5*l.* per cent. per annum will be allowed from the date of payment until the calls are due.

"In conformity with the Railways Clauses Consolidation Act, c. 16, s. 16, no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, or until he shall have paid all calls for the time being due on every share held by him. "JOHN GIBSON, Sec."

It was objected at the trial, on the authority of *The Ambergate &c. Railway Company* v. *Coulthard* (*a*), and *Stratford and Moreton Railway Company* v. *Stratton* (*b*), that the call, being made payable by instalments, was invalid. His Lordship inclined to think that the call was good as to the first instalment, though he doubted as to the others; however, on the authority of the above cases, he directed a verdict for the defendant, giving the plaintiffs leave to move to enter the verdict for them; either party to be at liberty to tender a bill of exceptions.

Welsby having accordingly obtained a rule nisi—

Crompton and *E. Beavan* (with whom was *Peacock*), appeared to shew cause, and submitted—First, that a call payable by instalments was invalid; Secondly, that the call, being payable in futuro, was invalid; and, Thirdly, that twenty-one days' notice ought to have been given before making the call, that is, before the directors passed the resolution, within 8 Vict. c. 16, s. 22. They were, however,

(*a*) Ante, p. 218; *S. C.*, 5 Exch. 459; 19 L. J., N. S., Exch., 311.
(*b*) 2 B. & Ad. 518.

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stopped by the Court(*a*), who said, that they entertained no doubt that a call made payable by instalments was valid; and that, as the defendant had leave to tender a bill of exceptions on the first point, he must adopt that course, and embody the other objections in it. That the rule must be made absolute in this case, and discharged as to *The London and North Western Railway Company* v. *M'Michael.*

Welsby (with whom were Sir *Fitzroy Kelly* and *Evans*,) appeared in support of the rule.

Rule absolute.

(*a*) *Alderson*, B., *Platt*, B., and *Martin*, B.

IN THE EXCHEQUER CHAMBER.

Trinity Term, 1851.

May 19*th*.

AMBERGATE, NOTTINGHAM AND BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY *v.* NORCLIFFE.

For the marginal note, *see* ante, p. 495.

THIS was a bill of exceptions to the ruling of *Platt*, B., who, on the authority of *The Ambergate &c. Railway Company* v. *Coulthard* (*a*), held that a call payable by instalments was invalid.

Whitehurst appeared for the plaintiffs in error (*b*).

Willmore for the defendant in error.

[The points and arguments in this case were the same as in the preceding cases; the case will be found fully reported in 20 L. J., N. S., Exch., 234.]

Judgment reversed.

(*a*) Ante, p. 218; *S.C.*, 5 Exch. 459; 19 L. J., N. S., Exch., 311.

(*b*) Before Lord *Campbell*, C.J., *Patteson*, J., *Coleridge*, J., *Wightman*, J., *Maule*, J., and *Cresswell*, J.

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IN CHANCERY.

BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE LORD CHANCELLOR.

Aug. 7th & 8th.
Nov. 2nd, 14th, 15th, 16th, 18th, 19th & 21st.

RUSSELL *v.* THE EAST ANGLIAN RAILWAY COMPANY.

A bond creditor of a railway Company filed a bill on behalf of himself and other bond creditors against the Company and the remaining bond creditors and mortgagees, some of whose debts had not then become due, praying an account of all monies raised by the Company upon bond or mortgage, and a declaration that the bond and mortgage creditors were entitled to be paid out of the estate and effects of the Company, and praying a receiver and manager.

An order having been made by consent for the appointment of a receiver, while he was in possession a simple contract creditor sued out execution, and levied upon the goods of the Company, and refused to withdraw after notice given of the appointment and possession of the receiver. Upon motion made before Vice-Chancellor *Knight Bruce*, to commit the sheriff and under-sheriff for contempt, the parties having declined to accede to a proposition by the Court to bring the amount of the levy into Court, the Vice-Chancellor refused to interfere.

The motion having been brought by appeal before the *Lord Chancellor*, he ordered the sheriff to withdraw from possession and pay the costs, without prejudice to any application by the execution creditor to be heard *pro interesse suo* or otherwise. The Court at the same time by its order protected the sheriff from any proceedings by the judgment creditor, he having been served with notice and appearing on the motion.

Whilst the motion last referred to was in course of decision, another simple contract creditor sued out execution on his judgment on the 7th of November, and on the 9th of the same month the officer of the sheriff of Norfolk entered the Company's station at Lynn, and seized the engine and carriages just then on the point of starting.

The *Lord Chancellor* in the second case made a similar order, but refused protection to the sheriff, on the ground that the execution creditor, for whom the sheriff acted, was not before the Court.

In the discussion of this motion the Court refused to entertain the question of the propriety of the order appointing the receiver, it being an established rule that such a question can only be discussed on a motion to discharge that order.

THIS was a motion to commit the sheriff and under-sheriff of the county of Norfolk for contempt, in having seized in execution carriages and other goods and effects of the East Anglian Railway Company, the same being, at the time, in the possession of a receiver appointed by an order of the High Court of Chancery.

The facts of this case, which are common not only to the motion but to the petition reported infra, p. 532, are as follow:—

By the East Anglian Railway Act, (10 & 11 Vict. c. cclxxv.) repealing three other Acts, and dissolving three other Railway Companies, the proprietors of those Companies were united and incorporated by the name of "The East Anglian Railway Company;" and the Companies Clauses Consolidation and other general Acts were

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made part of the special Act, save as to such parts thereof as might be modified by, or were inconsistent with, the provisions of the special Act; and the railways were vested in and became the property and effects of "The East Anglian Railway Company."

In the month of March, 1849, the Company, the whole of whose share-capital had been paid up, were under large liabilities to mortgagees and bond creditors for money advanced, and had also become indebted to Messrs. Bowes & Co. in the sum of 1147*l.* for coke supplied by them to the Company. On the 25th of October, 1849, Messrs. B. & Co. commenced an action against the Company for the amount of their debt; and on the 6th of December, the Company, having no defence to the action, consented to a judge's order, making the said debt and interest payable on the 30th of June, 1850, and at the same time gave their acceptances for the amount of such debt and interest, also payable on that day. An attempt was afterwards made by the directors of the Company, with the concurrence of the bond-holders, mortgagees, and some of the simple contract creditors of the Company, at a meeting duly convened for that purpose, to defer the payment of their debts and liabilities until the year 1857, undertaking in the mean time to pay interest on such debts and liabilities at the rate of 5*l.* per cent.

The propositions made by the directors at the meeting were assented to by many of the creditors; but on the 28th of June, Messrs. Bowes & Co. and others protested against the arrangement.

Default having been made by the Company in payment of the amount agreed to be paid, and the acceptances having been dishonoured, Messrs. Bowes & Co. on the 2nd of July, 1850, caused final judgment to be signed in the action, and on the following day caused a writ of *fieri facias* to be issued thereon to the sheriff of Norfolk.

On the 20th of June, Mr. Russell, a bond creditor of the

Company, filed a bill on behalf of himself and other bond creditors of the Company, whose bonds were then due, against the Company and certain other bond creditors and mortgagees.

The bill prayed that an account might be taken of the principal monies raised by the several amalgamated Companies under their respective Acts; and of the principal sums unpaid, and the arrears of interest thereon; and that it might be declared, that the bond and mortgage creditors of the Company were entitled to be paid out of the estate and effects of the Company, and according to the several priorities of such creditors; that the several amounts secured by their respective bonds and mortgages, together with all arrears of interest, and the respective priorities of such bond and mortgage creditors might be ascertained, and directions given for payment of such principal monies and interest out of the estate and effects of the Company; and that, in the meantime, such estate and effects might be secured for the benefit of the bond and mortgage creditors, according to their respective rights and interests; and that some fit and proper person might be appointed to take and have the management of the estate and effects of the Company, and the direction and superintendence of the working of the railway, and of all other business of the Company, and to collect and receive the tolls and other assets and effects of the Company; and that the Company might be ordered to deliver up to such manager and receiver, all the plant, stock, &c.; and that the receiver might be ordered, out of the tolls, to keep down the interest then due or thereafter to become due to the several bond and mortgage creditors; and that an injunction might be granted to restrain the Company from interfering in the direction or superintendence of the working of the railway, or receiving the tolls.

On the 25th of June, the plaintiff moved, before the Vice-Chancellor *Knight Bruce*, for the immediate ap-

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pointment of W. Seppings as receiver, without a reference to the Master; and thereupon, by the consent of all parties to the suit, an order was made, appointing him to take and have the management of the estate and effects of the Company, and to have the direction and superintendence of the working of the several railways belonging to or under the control of the Company, and of all other business of the Company, and to collect and receive the tolls and other assets and effects belonging to the Company; and it was ordered, that the Company should deliver up to the said W. Seppings, as such manager and receiver, all the plant, stock, goods, books, accounts, and other estate and effects belonging to the Company; and that he should pass his accounts before the Master, and from time to time pay the balances which should be reported due from him into the Bank, with the privity of the Accountant-General of the Court, to be there placed to the credit of the cause, subject to the further order of the Court.

On the 29th June, 1850, W. Seppings took possession of all the moveable and other goods, chattels, estate, property, and effects of the Company.

On the 25th July, a motion was made before his Honor, Vice-Chancellor *Knight Bruce*, on behalf of the receiver appointed by the Court, to commit the sheriff and under-sheriff for contempt of the Court. After the motion was opened, the Vice-Chancellor required that the judgment creditor, who had not then been served with notice of the motion, should be served, and that the defendants in the cause should also be served.

On the 1st August, all the parties having been served, the motion came on for hearing.

Mr. *Bacon* and Mr. *Miller* appeared in support of the motion.

Mr. *Roundell Palmer*, Mr. *Bunny*, and Mr. *Aspland*, for the sheriff and under-sheriff.

Mr. *Rolt* and Mr. *Toller*, for the execution creditor.

Mr. *Malins* and Mr. *Martindale*, for holders of bonds over due.

Mr. *Goodeve* and Mr. *Rogers*, for simple contract creditors.

Mr. *Dickenson*, for mortgage creditors; and

Mr. *Pryor*, for holders of bonds not yet due.

Mr. *Calvert* and Mr. *Baggallay*, the counsel for the Company, stated, that they had consented to the appointment of a receiver, with the view of preventing any creditor of the Company from obtaining an undue preference over others.

[The arguments of counsel are given on the hearing of the appeal motion by the Lord Chancellor, infra, p. 512.]

Mr. *Bacon* having replied—

Vice-Chancellor KNIGHT BRUCE.—In this case, upon the motion of the plaintiffs, and by consent of the defendants, a receiver was appointed of certain property in the possession of the defendants. After that had been done, the judgment creditors of the defendants, who were in possession of the property before the appointment of a receiver, issued execution, viz. by a writ of fieri facias, which was placed in the hands of the sheriff of Norfolk, and which the sheriff executed.

Thereupon, notice of the motion which is now before me, was given by the plaintiffs in the cause, the original respondents to the motion being, as I understand, the sheriff and the under-sheriff only. It was the Court that required, after the motion was opened, first, that the judgment creditor, who had put the sheriff into action, should be made a party to it, which was accordingly done; and, secondly, that the defendants in the cause should also be made parties to the motion, which has been also done.

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The motion which came on to be heard in the first instance was, "that the sheriff and under-sheriff might be committed for contempt of the Court, in disturbing and interfering with W. Seppings, the receiver appointed in this cause, by levying an execution at the suit of certain persons upon the effects of the Company, and taking possession of the carriages, goods, and stock, being part of the effects belonging to the Company." I do not question that, in certain circumstances, it would be competent for the Court to commit the sheriff and under-sheriff for the disturbance, by the execution, of the possession of the property over which the Court had appointed a receiver; but the Court is not necessarily bound to exercise that jurisdiction. It has a discretion in its mode of dealing with the matter. From the affidavits, in which the facts and circumstances of the case are disclosed, I am of opinion that it would be a very erroneous and improper exercise of the undoubted jurisdiction of the Court, to commit either the sheriff or the under-sheriff. Therefore, that part of the motion must be refused. This, however, does not dispose of the matter; because, considering the nature of the case, and the substantial object of the motion, if the notice had not gone further than merely to ask the committal of the sheriff, it would be competent to this Court to administer justice between the parties upon motion, according to that which was really the object and subject of it.

The motion, however, does not stop with these words, it goes on to ask, "that the sheriff, under-sheriff, and their officers and agents may be restrained by the order and injunction of the Court from levying any further execution, and from taking possession of the goods and chattels in the possession of and under the control of the receiver, and from further disturbing or interfering with the receiver; and that the sheriff and under-sheriff may pay the costs of the motion."

It is, perhaps, remarkable that, although the judgment

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creditor is now made a party to the motion, the prayer for costs has not been extended to him, but still remains confined to the sheriff and under-sheriff. I do not know that that is a circumstance of much (if any) materiality. It is observable also, that the motion does not, in terms, extend to the requiring the sheriff and under-sheriff to do that which ought to have been mainly its object, viz. to withdraw from the sheriff that which the sheriff had actually obtained. That, however, is not of much, if of any, materiality.

It is competent for the Court to deal with that matter according to the merits, whatever may be the language of the motion. The question, therefore, is upon the substantial merits of the case, considering who are the parties before the Court; this leads to the remark that there are, as it is said, and probably with truth, several writs for execution in the hands of the sheriff besides that of the judgment creditor who is before the Court; and it is said, that, pending the litigation or otherwise, the plaintiff is bound to serve every such subsequent execution creditor with notice of the motion. That point having been taken by the sheriff, I declined interfering. I thought the plaintiff was to be left to the exercise of his own discretion. He has exercised that discretion by not serving the notice upon the other execution creditors. The consequence is, that whatever I may do against the sheriff and under-sheriff in this action will be confined to them as the agents—for in a sense they are the agents—of the execution creditor before the Court; and I am altogether unable to do anything against the sheriff and under-sheriff in respect of any executions which they may hold from any other creditor. Such executions must be left to take their own course, to be or not to be the subject of some other application, which may seem fit to be made in such matters. I can do nothing on the present occasion which can directly or indirectly affect the absent execution cre-

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ditors or their agents, of whom the sheriff may be considered one.

As to the rights of the execution creditor who is actually before the Court, it has been contended during a part of the argument, that, as there is a receiver, and his possession has been interfered with, it is not competent to the Court in the present stage of the case to enter into the merits of the title of the persons who had interfered with the possession of the receiver; and that the Court, without reference to any question of merits, must in the first instance vindicate the possession of its own officer, and then put the question of title into a course of investigation in the Master's office or otherwise; and beyond all question it is within the function of the Court so to act. It is within the jurisdiction of the Court to treat the interference with the property as a contempt, to remove the party from the possession, and to send the parties concerned into the Master's office to be dealt with according to the merits of the case. But the Court is not bound to take that course. Ever since I have known the Court, it has been in the habit in cases of this description to deal with the question of the title of persons disturbing the possession of the receiver, according to the circumstances of the individual case; and there is no universal rule. I have known such cases in my own experience dealt with, I had almost said, in every conceivable manner. Now, here, to send the parties into the Master's office with an inquiry *pro interesse suo* would, I think, be a frivolous waste of time and money. There appears to be nothing to inquire about, which the Court is not as competent to decide as the Master would be; and, after all, the matter might be brought, by way of appeal, from the Master to this Court. I see much probable evil, and no advantage, in sending this, in its present state, to the Master's office, for any purpose whatever.

Then the question arises, if I do not send this to the

Master's office, what ought to be done by the Court in this particular case? I have said that this depends upon the circumstances; and among the circumstances not to be disregarded there are two preliminary facts which I think fit particularly to notice. One is, that I am not at all satisfied at present that the order for a receiver is not one against the policy of the law—is not one, in short, illegal, as unduly committing a portion of the trust committed by the Legislature to particular men to others, to whom the Legislature did not intend to confide the trust. The particulars of this order were, I think, not drawn to my attention. It was a consent order, and all I did was to appoint a receiver; not, as I believe, having any notion of the particular grounds on which it should be drawn up, the terms of which I suspect to be against the policy of the law, and illegal. This, however, may not be the time at which I ought to decide that question, and I do not decide it; but, I repeat, it is a circumstance not to be disregarded. There is another circumstance also, which I cannot omit to notice, namely, that upon the whole facts of the case, notwithstanding the attention due to the affidavits that have been read to-day, and which I dare say have been made by respectable men with an intention to speak with accuracy, notwithstanding all this, I am unable to feel myself persuaded of the good faith of this suit. I do not decide that it is a suit instituted in bad faith; I do not decide that there was concert in any ill sense or of a dishonest kind, or, in other words, that there was collusion. This is not the time to do it; but I repeat I am not satisfied with the suit, and I never have been from the first moment I heard of it; and I could not help foreseeing that the result of the consent order asked to be made would be some such application as that which is now made.

Now the title of those who have put a receiver over the property of the Company—perhaps honestly

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on the part of those who administer the affairs of the Company—depends on a right of lien (which, it is said, is given by the Acts of Parliament, or one of the Acts which have been mentioned,) over the moveable goods of the Company, and which alone are affected by the execution in question. Now, I have considered those Acts of Parliament with all the attention in my power, and I have been unable to arrive, I am sorry to say, at a clear understanding of them; but the inclination of my opinion is, that it would be an erroneous construction of the Acts, to hold that they give the lien upon the moveable goods of the Company, which they are supposed to do. I do not, however, decide the point. I only deal with it at present as a question of considerable difficulty, which it may be right, and probably will be right, to have decided not in the incidental manner in which the point is raised on the present occasion, but in a suit either here or at law for the purpose. A suit here for the purpose might include the direction of a case for the opinion of a Court of law. If I were satisfied that the lien upon moveable chattels was not given by the Acts of Parliament, or either of them, then I think that I must in common justice allow the execution creditor to proceed, and not allow the formal existence of rights to interfere with the rights of others, there being nothing contemptuous intended towards the Court. What I ought to do may be open, perhaps, to considerable doubt; but when I see a cause before me of which the good faith is doubtful to me —not meaning to express myself disrespectfully to any individual, not meaning to doubt the good intention of any person who has made an affidavit—and when the order before me appointing a receiver is one which contains provisions that are, in my opinion, against the policy of the law and illegal, the course, I consider, in such a state of things, which it is fit to take is this, to allow any of the parties in the cause who may think fit, to bring the debt

and costs into Court, to be carried to a separate account, to be reserved for the benefit of the execution creditor if he shall be entitled; and that being done, to direct the sheriff to withdraw as far as this execution is concerned; but if that is not done, then to allow the process to be executed. I require every shilling of the debt and costs to be brought into Court as a condition of requiring the sheriff to withdraw.

Mr. *Rolt* inquired whether it was intended to reserve the question of the execution creditor's costs.

The VICE-CHANCELLOR said, that he should reserve all the costs except those of the sheriff. The motion had been made, in the first place, against the sheriff and under-sheriff, without bringing before the Court the party who had put them in motion. Those who had done so must pay the costs of the sheriff and under-sheriff, reserving the question how they were ultimately to be borne. He could not give the sheriff any poundage.

Aug. 2nd. The VICE-CHANCELLOR made the following order:— "The plaintiffs and the defendants declining to bring the amount of debt and costs into Court, the Court refuses the motion with costs as against the sheriff and under-sheriff, without prejudice to the question by whom they are ultimately to be borne. The costs of other parties, including the costs of the execution creditor, to be costs in the cause, with liberty to apply."

Aug. 7th. The plaintiff now renewed his motion, by way of appeal from the decision of the Vice-Chancellor, before the Lord Chancellor.

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Sir *F. Kelly*, Mr. *Bethell*, Mr. *Bacon*, and Mr. *Miller*, in support of the motion.—

[The *Lord Chancellor*, at the commencement of the argument, said that counsel need not discuss the propriety of the order appointing the receiver, as it was the duty of the judgment creditor not to have diregarded it, but to have applied to the Court to dissolve it. As, in cases where a receiver has been appointed, a person having a superior title to the plaintiff must ask leave of the Court before he is permitted to bring his action of ejectment.]

The sheriff in this case clearly exceeded his authority by interfering with the possession of the receiver; for, under the Act, we contend that the bond-holder had a specific lien on the very articles which the sheriff has seized. When a receiver has been appointed, his possession is that of the Court, and any attempt to disturb it without the leave of the Court first obtained, will be a contempt on the part of the person making it: *Anon* (*a*), *Angel* v. *Smith* (*b*). A receiver appointed by the Court is a receiver on behalf of all parties, and does not oust any party of his right to the possession of the property (*c*). The decision of the Vice-Chancellor must be wrong, inasmuch as he has not declared the order invalid, nor has he declared that the possession of the receiver on behalf of the bond-holder does not extend to the articles which the sheriff has seized. Neither has he put the right of the judgment creditor in a course of investigation, by giving him leave to come in and be examined *pro interesse suo* (*d*). He has permitted the sheriff to act in direct defiance of this Court, which this Court will never allow: *Evelyn* v. *Lewis* (*e*), *Kaye* v. *Cunningham* (*f*), *Kendal* v.

(*a*) 6 Ves. 287.
(*b*) 9 Ves. 335.
(*c*) Dan. Ch. Pr. 1610.
(*d*) 2 Madd. Ch. Pr. 305.
(*e*) 3 Hare, 472.
(*f*) 5 Madd. 406.

Baron (*a*), *Attorney-General* v. *Tancred* (*b*). It appears that the receiver served notice of his appointment and possession on the 5th of July, before he proceeded to execution, and the sheriff was bound after such notice to have abstained from further proceedings: *M'Neil* v. *Garratt* (*c*).

Mr. *Malins* and Mr. *Martindale*, who appeared also in support of the motion on behalf of other parties, on objection taken by Mr. *Rolt*, were refused a hearing, on the ground that they had not joined in the appeal, nor themselves appealed.

Mr. *Rolt* and Mr. *Toller*, for Messrs. Bowes & Co., the judgment creditors.—The judgment creditor is now before the Court, and it is competent for him to enter into the question of the validity of the order appointing a receiver, and the extent of his powers. The plaintiffs having served this party with notice of the motion, must be understood to have waved the contempt, and to have called on him to establish his rights. [The counsel then went into a lengthened argument on the invalidity of the order, and the right of the sheriff to proceed as he had done.] If the Court can, upon motion to commit for contempt, order a party to be examined *pro interesse suo*, it surely has jurisdiction, with full view of the whole case, to decide at once upon the propriety of the party being heard as to his rights: *Dixon* v. *Smith* (*d*), *Empringham* v. *Short* (*e*), *Johnes* v. *Clauchton* (*f*). The question of the validity of the order is incidental to the question of right, and must depend upon it. There are three courses, either of which the Court can adopt. It may determine the rights of the judgment creditor at once; it may send him to law to establish those rights; or it may

(*a*) 1 Dick. 89.
(*b*) 2 Dick. 798.
(*c*) Cr. & Ph. 98.
(*d*) 1 Swanst. 457.
(*e*) 3 Hare, 461.
(*f*) Jac. 573.

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send him before the Master: but it will not work an injustice by depriving him of his remedy, and by refusing to allow him to use the means which a Court of law has given him. The receivership does not extend over the carriages and effects of the Company, but over the tolls; for it never was intended that the officer of the Court should supersede the board of directors. The following cases were also cited:—*Hartley* v. *Gilbert* (*a*), *Hammond* v. *Mayber* (*b*), *Braham* v. *Earl Strathmore* (*c*), *Oswald* v. *Landles* (*d*).

Mr. *Roundell Palmer*, Mr. *Bunny*, and Mr. *Aspland*, for the sheriff and under-sheriff.—The Court has a large discretion in motions of this nature, and will not in every case commit for disturbing the possession of the receiver; much will depend on the validity or propriety of the appointment: *Rowley* v. *Ridley* (*e*), *Drewry* v. *Thacker* (*f*). The sheriff had no option whether to proceed or not, he was bound to do so; and if he had not levied, he would have been liable to the judgment creditor, or incurred the risk of imprisonment: *Stockdale* v. *Hansard* (*g*). Neither the sheriff nor the judgment creditor himself could move to discharge the order, not being parties to the suit. The sheriff could not compel the judgment creditor to come in and ask to be examined *pro interesse suo*, nor will he be protected by this Court if he does not act: *Rock* v. *Cook* (*h*), *Onyon* v. *Washbourne* (*i*). He could not make a return of "nulla bona." In *Payne* v. *Drewe* (*k*), if the sequestration had been executed, "nulla bona" would not have been a good return to the writ;

(*a*) 21st Dec. 1842, Reg. Lib. A. 1842, fol. 319, L. C.

(*b*) 4th August, 1821, Reg. Lib. A. 1820, fol. 1905, L. C.

(*c*) 20th Dec. 1823, Reg. Lib. A. fol. 1339, L. C.

(*d*) 25th March, 1845, Reg. Lib. B. 1839, fol. 546, V. C.

(*e*) 2 Dick. 622.

(*f*) 3 Swanst. 529, 546.

(*g*) 11 Ad. & E. 253.

(*h*) 2 Ph. 691.

(*i*) 14 Jur. 497.

(*k*) 4 East, 523.

neither could the sheriff make such a return in the present instance. He had acted to the best of his judgment in a case involving great difficulty. If the Court would now decide the rights of the parties, the sheriff would submit to do whatever the Court should direct. All that the sheriff had done may turn out to be quite right; and, although the step has been taken without leave, and ought not to have been so taken, yet the Court would not, if it were now satisfied of its propriety, interfere: *Aston* v. *Heron* (*a*), *Gooch* v. *Haworth* (*b*). The motion in the present case was wrong, for it ought to have asked the commitment of the judgment creditor, and not of the sheriff, who was compellable to act: *Chaplin* v. *Cooper* (*c*), *Franklyn* v. *Thomas* (*d*). In this case the contempt is not complete, for the sheriff has only asserted his right, but has not removed anything; it is only a constructive seisin quite consistent with the continued possession of the receiver. It cannot be, therefore, said, that he has exceeded his duty or interfered with the officer of this Court: *White* v. *Chappell* (*e*), *Belcher* v. *Patten* (*f*), *Adams* v. *Osbaldiston* (*g*), *Wilson* v. *Tumman* (*h*), *Wells* v. *Pickman* (*i*).

The illegality of the order may be questioned on this motion, in the same way that the validity of a mandamus is on the return made to it: *The Queen* v. *Powell* (*k*), *The Queen* v. *Ledgard* (*l*), *Clark* v. *The Leicestershire and Northamptonshire Union Canal Company* (*m*). Again, the order of this Court may de declared void at law, if it contravene existing statutes; and the sheriff would be right in not obeying it: *Muskett* v. *Drummond* (*n*), *Nelson* v.

(*a*) 2 My. & K. 390.
(*b*) 3 Beav. 428.
(*c*) 1 Ves. & B. 16.
(*d*) 3 Mer. 234.
(*e*) 4 C. B. 628.
(*f*) 6 C. B. 608.
(*g*) 3 B. & Ad. 489.
(*h*) 6 M. & Gr. 236.
(*i*) 7 T. R. 174.
(*k*) 1 Q. B., N. S., 352.
(*l*) Id. 616.
(*m*) 6 Id. 898.
(*n*) 10 B. & C. 153.

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Cherrill (*a*), *Wilson* v. *Aldridge* (*b*), *The Queen* v. *Williams* (*c*); *St. John's College* v. *Murcott* (*d*).

Mr. *Bethell*, in reply.—Whether the order of this Court be right or wrong, so long as it remains in force it must be obeyed: *Woodward* v. *The Earl of Lincoln* (*e*). It is no justification to the sheriff that the party for whom he is acting is the delinquent party. He must be supposed, after notice, to have been aware that he was aiding and assisting in an unlawful course, and acting in contempt of the orders of this Court. The form of the motion is equally right with respect to the under-sheriff, for his acts must be considered those of his principal: *Robinson* v. *Lord Byron* (*f*), *Partington* v. *Booth* (*g*).

The condition offered in the Court below would have been incorrect; for if it was right that the debt due to one judgment creditor should be brought into Court the same would apply to all, and yet that formed no part of the condition.

While the foregoing motion was being heard, E. Forster, another judgment creditor, sued out execution on his judgment, and the sheriff of Norfolk, on the 9th of November, 1850, entered the Company's station at Lynn, and seized certain engine and carriages then about to start. A motion was thereupon made, by special leave, before the Lord Chancellor, to commit the sheriff alone for this fresh contempt; but no notice of the motion was served on the judgment creditor, E. Forster.

Mr. *Bethell*, Mr. *Bacon*, and Mr. *Miller*, in support of the motion.

(*a*) 8 Bing. 316.
(*b*) 8 Mod. 315.
(*c*) 2 Car. & Kir. 1001.
(*d*) 7 T. R. 259.
(*e*) 3 Swanst. 626.
(*f*) 2 Dick. 703.
(*g*) 3 Mer. 148.

Mr. *Roundell Palmer*, Mr. *Bunny*, and Mr. *Aspland*, contrà.—The decision of the Vice-Chancellor *Knight Bruce*, on the motion before him, did not warrant the sheriff in directing the under-sheriff not to act; and, although that decision may be reversed on appeal, as long as it stands, it must justify the sheriff in pursuing a course which the Court has not declared to be wrong. The sheriff has acted in the manner least likely to fix liability on himself, and he cannot be condemned for having chosen the least of two difficulties. The motion ought to have asked the commitment of the under-sheriff, not of the sheriff, as the under-sheriff had acted throughout, and must incur the personal responsibility, if any; or, at all events, the party moving the sheriff is the party, if any, to blame, but not the sheriff, who never acts for himself, and is, in fact, ignorant of the proceedings of his deputy.

Mr. *Bethell*, in reply.—The sheriff is the individual who is aiding and assisting in doing that which is a contempt of the Court, and on him the responsibility of what has been done rests; he is the person to be visited with the consequences of his acts: *Kendal* v. *Baron* (*a*), *Stockdale* v. *Hansard* (*b*).

The LORD CHANCELLOR, at the close of the argument, intimated, that it was desirable that the real question at issue between the parties should be decided by a direct application rather than in the present form; that no case had been cited in which Courts of law had ever interfered with property in the possession of the officer of the Court of Chancery; and that the proceeding in this case was very ill-advised. That there did not, however, appear to be any direct authority for the committal of a sheriff for the act of the under-sheriff, the case of *Kendal* v. *Baron* being one in which it was to be inferred that the act com-

(*a*) 1 Dick. 89. (*b*) 11 A. & E. 253.

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plained of was that of the high bailiff personally. That still, however, the safety of the public might require it on the present occasion. His Lordship then said, that he did not wish to act hastily in the matter, and that he would give judgment on the 21st instant; and that, in the meantime, if any judgment creditor should attempt to levy, the Court would visit him with the gravest censure.

On the 21st November, Mr. *Roundell Palmer*, on behalf of the sheriff and under-sheriff, stated, that he was instructed to offer their humble apology to the Court, for any apparent disrespect of its authority. He produced an affidavit, stating, that the sheriff and under-sheriff had acted under misapprehension and in ignorance; and that they were willing to submit to the order of the Court, and to withdraw from possession; and, at the same time, he read an affidavit of the officer in possession, denying any collusion between the first and second judgment creditor, and stating, that the seizure had been made solely with the view of avoiding greater responsibility.

The LORD CHANCELLOR, in giving judgment on the first motion, said—This case comes by way of appeal against an order made by the Vice-Chancellor *Knight Bruce*, the object of the present motion being, to discharge that order. That order was made upon an application to commit the sheriff of the county of Norfolk, and his under-sheriff, for a contempt alleged to have been committed against the authority of this Court, by having entered on the possession of a receiver acting under the authority of this Court, and wresting from his possession certain goods and chattels by virtue of a fieri facias, issued in the cause of Bowes and others against the defendants in the present suit.

It appeared, on the hearing of the motion for commitment, that early in July, 1850, the order, under which the receiver was appointed, had been transmitted to the

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under-sheriff in the country. It had been transmitted to him without any letter, or any direct explanation in regard to the object of the transmission, and he states in his affidavit, that he, having certain transactions with the Company in relation to the purchases or sales of property, conceived that, for some purpose or other, the order had been so transmitted to him in relation to those transactions. Although, it is to be observed, that a document of this nature sent to the under-sheriff, unaccompanied with any explanation, looked much more in the nature of a public notice, than any communication in relation to private business; yet such is his statement, and he appears not to have taken any measures upon it. Upon the 4th of July, 1850, a writ of fieri facias, in the cause of Bowes and others *v.* The East Anglian Railway Company, was received in London, at the office where the business of the shrievalty is carried on, and was transmitted to, and received by, the officer on the 5th of July, and on that day, the officer in communication with the acting under-sheriff proceeded to seize the property belonging to the defendants; but, immediately that he made his business known, the receiver appeared, and gave distinct notice to the officer, that he was in possession of all the property on the premises where they then were, and warned the officer against seizing any part of the property, or interfering with his, the receiver's, possession. The officer, however, persisted in the seizure, and took certain property, of which he has ever since remained in possession. It appears that notice was given to the various persons acting under the sheriff, and a distinct requisition made, to restore that property to the receiver. This notice and requisition were disregarded, and the receiver was summoned to appear before a Judge of one of the common law Courts, to state the particulars of his claim, and to come in and interplead with the plaintiffs in the execution, thus making the officer of this Court give an

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account of, and justify, his acts to another Court, and seeking to subject him to the order of that other Court, in the execution of his duty as an officer of this Court. That summons, it appears, was attended by the receiver, who acted upon the occasion most properly; he stated that he was the officer of the Court of Chancery, that he denied the authority of the Court of common law, and that he looked to this Court to protect him in the execution of his office as receiver. This was a course perfectly proper for him to take; and I think he would have neglected his duty to this Court if he had in any way submitted to another jurisdiction.

In this stage of the case, I cannot help looking at what might have resulted from, and been the consequence of, that application. Suppose the learned Judge had called on the receiver to interplead, and, on his declining to do so, had barred his claim. Such a proceeding would have brought the authority of this Court immediately under the jurisdiction of a common law Court, and have occasioned a conflict between the two jurisdictions; a circumstance which would have placed each Court, seeking to maintain its own jurisdiction, in a position of extreme difficulty. The summons was not dismissed upon the statement made by the receiver, but was only adjourned. The receiver was, therefore, kept under the authority of the summons, so far as it could be done, and that after notice of a motion to commit. When the motion to commit was made, the answer given to it was, that, although the receiver, at the time of the levy, gave notice that he was in possession of the property as an officer of the Court of Chancery; yet that the plaintiffs in the execution considered the order under which the receiver was appointed, an ill-advised, illegal, and indiscreet order; and that, therefore, they were justified in treating it as a nullity. It was contended on the other side, that it was wholly irrelevant to the application, whether the order was, or was not, such an order as this

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Court, on further consideration, would deem it right to have made; that it was a subsisting order, that the officer was acting under it when he was interrupted by the sheriff; that an officer, so acting under the authority of the Court, was entitled to the protection of the Court; that, if the order was incorrect, in a degree which interfered with the legal rights of the plaintiffs in the execution, it was open to them to come to the Court to question the propriety of that order in a proper manner; but that it was not open to them to do so by discharging it, and by interrupting the officer of the Court. The case was discussed at considerable length, and the Vice-Chancellor appears to have entertained doubts which, I think, were well founded with regard to that order; but he stated, and it appears to me correctly, that that was not the occasion on which the Court could be properly called upon to decide on the validity of the objections to the order; and he therefore declined to express any determinate opinion upon that subject, intimating that they might be proper matters to be discussed hereafter. With a view, however, of putting the matter in a proper course of discussion, his Honor was pleased to offer, that, if the amount of the levy was brought into Court by any of the parties to the cause, he would direct the sheriff to withdraw. The parties declined to accede to that proposition; whereupon his Honor made the order, which has been appealed against, in which he declined to make any order with regard to the execution, and left the sheriff to take his own course, as far as that was concerned; and directed that the parties should pay to the sheriff his costs of that application, reserving the question as to who, ultimately, should bear those costs.

That order left the sheriff of course to act in the seizure which he had made on the possession of the receiver, and directed, that the plaintiffs should pay the costs. Now that order is appealed against, and the same course of ar-

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gument has been pursued before me as was pursued before his Honor; the justification for the seizure being, that the order was improperly made, and the receiver improperly appointed, on various grounds. But entertaining the same opinion as the Vice-Chancellor entertained, that it was not competent or proper for the Court to decide on those objections to the order in this shape, I am of opinion, that the sheriff was wholly wrong in entering on the possession of the receiver; and that he is not in a situation to make that defence which he attempted to make before the Vice-Chancellor, and has repeated before me.

I have looked with care through the various authorities that have been cited, but I do not think it would be a useful occupation of the time of the Court, if I were to go through the very numerous list of authorities. My opinion of the result is this, that it is an established rule of this Court, that it is not open to any party to question the orders of this Court, or to question any process issued under the authority of the Court by disobedience. I know of no act which this Court may do, which may not be questioned in a proper form and on a proper application; but I think it is not competent for any one to interfere with the possession of a receiver, to disobey an injunction, or to disobey any other order of the Court, on the ground that such orders were improvidently made: they must take a proper course to question them, but while they exist, they must obey them. I consider the rule to be of such importance to the interests of the public, to the peace and safety of the public, and to the due administration of the justice of this Court, that it is a rule I hold inflexible on all occasions. I know not how the officer of this Court is to act, with that confidence in the protection of the Court, which he is entitled to, if he is uncertain, if he be a receiver, whether he is justified in taking possession of the property which he is ordered to take; and so with respect to any other order which can be imagined, that is executed by an officer of this Court. I do not know how

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the Court can expect the officers to do their duty, if they do it under the peril of resistance, and of that resistance being justified on grounds tending to the impeachment of the order. I think it is essential to the dignity of this Court, to its proper administration of justice on behalf of the public and the suitors, that its authority should be obeyed; and if it should be supposed that it has been exercised in a manner inconsistent with law, or inconsistent with the interests of parties, that they should come in a proper mode to question it, but disobedience is by no means the mode proper for that purpose.

On the present occasion, it would have been perfectly open to the plaintiff in the execution, to have applied to this Court to be heard *pro interesse suo*, or to have been heard on a summary application for leave to levy under his execution, notwithstanding the possession of the receiver. I know of no instance in which justice may not be conveniently obtained by persons who are supposed to have their rights interfered with by any order or process issued by this Court. I find in one case, that where a party wished to distrain for rent on property in the possession of the receiver, that the Court, being satisfied that the legal right of distress was paramount to the title of the party, for whose benefit the receiver was appointed, the Court allowed the distress to be made. I find in another case, that where property liable to distress had been sold, and the receiver had received the proceeds and paid them into Court, the landlord having claimed a right to distrain while the receiver was in possession, this Court ordered the receiver to pay, out of those proceeds, to the landlord the rents that were due to him, the receiver being in possession for the benefit of the tenant for life, who was liable for the payment of that rent which was so sought to be distrained for on the property in the possession of the receiver; and I apprehend it may be taken as a rule equally general, that though this Court may have issued a process, though it

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may have made an order which may interfere with the supposed rights and interests of other parties, not parties to the cause, it is always competent for them to make an application to the Court for relief; and it is not to be presumed or doubted, but that justice will be duly administered to them on that application.

It seems to me, therefore, that the seizure in this case was made under circumstances which render it not only not justifiable, but not even excusable; because the gentlemen who take the office of under-sheriff are generally men of character, experience, and intelligence, and cannot be supposed competent to discharge the duties of that office if they are not aware of that rule, which is not confined to this Court, but which is common to all Courts, and essential for all Courts, to enforce and to maintain their authority for the benefit of the public, namely, to punish resistance to their process and disobedience. I cannot account for the gentlemen in this case acting on behalf of the sheriff not being fully aware, that, if a receiver was in possession of the property, it was not competent to any person to disturb him; still less can I account for their attempting to call on the officer of this Court to justify his proceedings in another Court, to bring that officer under the jurisdiction of that other Court, and to bind him in his course of conduct by the orders of that Court, he being amenable, with reference to the circumstances of this case, to this Court alone. I am considerably relieved by the course which has been taken this morning: I have been told that the parties by a formal affidavit state that they acted under a misapprehension; and that, as soon as they had the means of correcting their error, they were desirous of submitting themselves to the jurisdiction of the Court; and that they have withdrawn from possession. That, undoubtedly, may render it unnecessary to take such steps as might have been called for in the case of resistance.

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It has been said, that the order which is appealed against permitted the sheriff to proceed with his levy. I perfectly agree with the Vice-Chancellor, that, on motions of this description, it is always discretionary in the Court what course they will pursue; but I consider that discretion subject to one limitation, that is, to support the authority of the Court, and to support its officers acting under that authority. I cannot consider that that is done, if those who have by force resisted that officer, and taken out of his possession that which he held under the order of the Court, are allowed to retain the fruits of their conduct. I, therefore, have no hesitation or difficulty in ordering that the sheriff and his officers do forthwith withdraw, and that they pay the costs of the application to the Court below, that is without prejudice to any application that the sheriff or the plaintiff may be advised hereafter to make.

While I think it my duty to protect the receiver of this Court, so long as he is acting under the authority of the order of this Court, I should also think it my duty to protect the sheriff when he yields obedience to and acts under the authority of this Court. The order, therefore, that I propose to pronounce on the first application is:—That the sheriff and his officers forthwith withdraw from the possession of the goods, chattels, and effects which have been taken under colour of a writ of fieri facias, in the cause of Bowes and others against the present defendants, the East Anglian Railway Company, and restore the same to the receiver; and that they do forbear all interference and interruption with the possession of that receiver; that they pay the costs and expenses of and occasioned by the seizure, and of the motion before the Vice-Chancellor *Knight Bruce*. That the sheriff be injoined from all proceedings at law for the purpose of compelling the receiver to interplead. That the plaintiff in the execution be injoined from taking any proceedings at law against the sheriff in relation to the property and

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effects lately seized by him, or any other property in the possession of the receiver. That the sheriff do pay the costs in relation to the summons of interpleader; that this order is without prejudice to any application which the plaintiffs in the execution may be advised to make, to be heard *pro interesse suo* or otherwise, in relation to the property in the possession of the receiver, in order that the plaintiff in the execution may not be damaged by the receiver having been put into possession, supposing it should appear that such possession ought not to have interfered with his right. That the receiver be ordered to keep and retain within the bailiwick for fourteen days goods, chattels, and effects equal in value to those lately seized by the sheriff, not exceeding what would be necessary to satisfy the levy in the said writ of fieri facias mentioned and referred to in the affidavits; and if the parties differ about the value, that it be referred to the Master to ascertain it.

That is the order which I propose to pronounce in the first case, by which it appears to me that the authority of this Court is maintained in a proper manner, and consistently with the rules and practice of the Court. The sheriff is protected by his obedience to the Court from any proceedings by the plaintiff in the execution, and the plaintiff in the execution left at liberty to pursue his rights by a proper application to the Court. As far as I can judge, that is the correct order which I think it right to make on the first application.

Mr. *Rolt*, on behalf of the execution creditor, asked for his costs in the Court below, on the ground that he had been served with notice of motion; that he knew nothing of the appointment of a receiver, and had merely employed the sheriff in the ordinary way.

The LORD CHANCELLOR.—There was no motion to commit him, and it was not necessary for him in the first in-

stance for his protection to have appeared, but he might have thought fit to maintain and support what the sheriff had done, and he accordingly did so. You need not have appeared, but as you did, and maintained and supported the sheriff, and as you have attempted to enforce your writ by ruling him to return it, it appears to me that you were the real party who forced the sheriff to the commission of the contempt. Your appearance, therefore, being voluntary, you must sustain your own costs.

Mr. *R. Palmer* objected, that, as the order then stood, each creditor would have to make a separate application to the Court.

The LORD CHANCELLOR.—I have considered this a good deal, and with the view of seeing that I might not prejudice the rights of the execution creditors. The goods being now in the possession of the Court, they are not subject to the execution; but as soon as they do become subject, if ever that should happen, by the order of the Court, the writs would take priority according to their lodgments with the sheriff, so that at the first moment but one execution could attach, and the rest would follow according to their priorities.

The LORD CHANCELLOR then gave judgment on the second motion, as follows:—It certainly excites my surprise, and I cannot understand, when the parties were warned by their counsel that they were exposed to the censure and animadversion of the Court of Chancery if they interfered with the possession of the receiver, why they should have acted as they have done. They must have known they could make an application to the Court in such a manner as to protect the sheriff. They must have been aware that the sheriff was under a duty to one Court, which was incon-

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sistent with his duty to this. He has treated the authority of this Court with great levity, and he must take the consequences. The Court is not disposed to assume jurisdiction over other Courts, neither will it give up any portion of that authority which it is bound to maintain for the benefit of the public. This can only be done by supporting its officers in the execution of its orders and processes, and not allowing disobedience and resistance to be the mode of questioning the propriety of the exercise of its discretion. The sheriff has acted extremely wrong in making a second seizure while this Court was engaged in considering whether he should or not be committed for a former one. I do not throw out of my consideration that which is alleged as an excuse, viz. that he construed the order of the Vice-Chancellor to mean that he had not done wrong in the former seizure, and that he had sufficient confidence in that decision to warrant him in entertaining an opinion, that it would not only warrant what he had done, but that it would be confirmed on appeal. I give full weight to that excuse, by forbearing to do what I should otherwise have felt myself compelled to do, viz. to commit him. Allowing, however, the fullest effect to the possible influence which that decision may have had in making him take a course foreign to what I consider to have been his duty, and clearly contrary to law, I must in this, as in the former case, order the sheriff to withdraw.

This seizure appears to me to have been made under circumstances which can hardly be accounted for without imputing personal motives; and if the existence of such motives were made out to my judicial satisfaction, they would deserve the severest censure. The officer of the sheriff finds a train just about to start, the passengers are on the platform, and the receiver is under a pledge to the public to start in a few minutes. There was, as it has

been sworn, and not contradicted, at that time other property on the premises quite adequate to satisfy the execution; but he thought fit to stop the train. Looking at the nature of the property, and the circumstances under which it was seized, and the possible consequences of resistance on the part of the receiver, (from which, however, he most properly abstained), it appears to me that it would be extremely dangerous if I held out the slightest idea that the sheriff was excusable in the course he pursued. I know not what pecuniary consequences may have arisen, or may even yet arise, from the detention of the train; but whatever they may be, the sheriff must be amenable to them.

The order, therefore, will be as in the former case, that the sheriff and his officers withdraw and pay the costs of and occasioned by the seizure and detention, with a like injunction against any proceedings at law against the receiver, to compel him to interplead or otherwise in respect of the property in his possession. In this case, however, I cannot give the sheriff that protection which I did in the former, because the plaintiff in this execution is not before me; but it will be open to the sheriff to make application for protection, if any execution creditor shall rule him to return the writ, or take any measures to make him amenable in respect of the property seized; and this order is made without prejudice to any application which the sheriff or the plaintiff in the execution may be advised to make, and the receiver is to retain goods within the bailiwick for fourteen days, as in the case of the first application. The application for commitment I shall order to stand over till the second day of next term, in order that it may be seen in the mean time if anything has occurred which may have subjected the receiver or the Company to peril by reason of the conduct which the officer has pursued. Such seems to me to be in effect the order which it is necessary for me to make for the purpose of

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maintaining the authority of this Court. There has been only one case mentioned which at all suggests that it was competent to the parties to justify what they did by objections to the order for the receiver. That case is *Drewry* v. *Thacker* (*a*); and, supposing the expressions therein contained to be accurately reported, and to have the effect contended for, I cannot think that it is consistent with the general course of the authorities. It seems to me, however, that the case in question is not susceptible of the meaning which has in argument been attributed to it. It appears that an action had been there brought against the administrator; that the administrator had pleaded certain pleas, upon some of which the plaintiff would have been entitled to a judgment de bonis propriis; that afterwards an agreement was entered into by which the parties severally bound themselves not to make any application to the Court to stay proceedings in the judgment; but that, notwithstanding this, a bill was filed and an injunction obtained. The cause came before the Court on a motion to commit for a breach of that injunction; and the Lord Chancellor, in the course of a long discussion, and referring to an application to injoin the creditor from proceeding at law, the suit being a suit for the administration of the assets, and the plaintiff at law having a judgment entitling him to execution against the assests of the intestate, says (p. 546):—"On a full explanation of the facts there might have been a difficulty in granting that pplication; the order, however, has been made, and must be obeyed." Thus, though there is here an intimation of opinion that the application for the injunction would not have been granted, if the attention of the Court had been called to the facts, yet it is distinctly stated, that the order having been made must be obeyed;

(*a*) 3 Swanst. 529.

and then comes the expression which has been relied on in argument:—"But on an application against persons guilty of a breach of it, the Court would forget its duty if it did not give to them the benefit of the fact, that the order ought not to have been made." Now, what is the benefit of the fact that the order ought not to have been made, if, though it ought not to have been made, it cannot be obeyed? All that I can understand is, that the Court, in administering punishment, would attend to all the circumstances of the case, and amongst others to the circumstances under which the order has been made; but that is not at all intended to impugn the general principle which is laid down, that an order once made by this Court must be obeyed. I can only understand the words "must be obeyed" as meaning, that, if the order is not obeyed, the party shall be liable to punishment. This is the only case that appears to me to warrant the idea, which I think would be extremely dangerous if at all sanctioned, that orders made by the Court, injunctions granted, or process issued, may be resisted on grounds of objection to the exercise of the discretion under which the Court has acted. They must be obeyed; and a proper application made to the Court to question their propriety, if it is thought they have been improperly made.

I have given this case a good deal of attention, and have read through the affidavits, so far as I have deemed it necessary; but I think that, on the present occasion, I have only to maintain the jurisdiction of the Court to the extent that the interests of the public require, while, at the same time, I consult the interests of the parties.

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to all the remedies given by the Act, but not to the prejudice of those who have been more active in enforcing their legal rights: *Perkins* v. *Prichard* (*a*), *Myatt* v. *The St. Helen's and Runcorn Gas Company* (*b*). The bond creditors have not pursued their legal remedies in procuring a receiver to be appointed by this Court; they should have applied to two justices, under the 54th section of the Companies Clauses Consolidation Act. It is extremely doubtful, whether, if the facts had been before the Court, it would have made an appointment at all, or even whether it has the power of appointing a receiver of a railway. It is against public policy that the management of an immense concern, which has been confided by the legislature to a body of responsible persons, who are liable to the public for any mismanagement, should be intrusted to the single officer appointed by this Court, who may not have the physical means of superintending so large a concern. The statutable receiver has only to receive the tolls, he is not put in possession of the moving stock, neither can he interfere with the working of the line; whereas, the receiver appointed by this Court is invested with the supreme control over everything, without any responsibility in the event of the public being prejudiced by his mismanagement. If a passenger were to suffer injury by delay or accident, he cannot recover compensation from the receiver; and no action could be brought against him without the leave of the Court. The Court, having all the circumstances before it, has jurisdiction at once to admit the right of the petitioners, without sending them to the Master, there being no facts in dispute; the only question is, whether the petitioners may pursue their remedies notwithstanding the receiver. The Court may at once make such an order, if it is of opinion that the receiver was not properly appointed, or that the rights of the bond-holder do not override those

(*a*) Ante, Vol. 3, p. 95. (*b*) Ante, Vol. 2, p. 757.

of the simple contract creditor. In support of their argument, the counsel referred to the 36th, 44th, 53rd, and 54th sections of the Companies Clauses Consolidation Act, 8 Vict. c. 16., and the 32nd section of the special Act, 10 & 11 Vict. c. cclxxv(*a*).

Mr. *Bethell*, Mr. *Lee*, Mr. *Bacon*, and Mr. *Miller* for the plaintiff in the suit.—It is immaterial whether the Court decide at once as to the interest of the petitioners, or send it to the Master. We contend that they have not such an interest as will give them priority over the plaintiff, or enable them to oust the receiver. There is clear evidence of the parliamentary and equitable title of the receiver; and the present application is incompatible with that right. The debts for which the bonds are a security were the means of making the railway and bringing it into existence, and, therefore, have an equitable priority over other subsequent debts. The parties dealing with the Company might have inquired into and ascertained from the register of bonds and mortgages, which is duly kept, what were then the liabilities of the Company, and they would have known

(*a*) By the 32nd section, it is enacted, "That the respective mortgagees and bond creditors shall be entitled to be paid, out of the tolls and other estate and effects of the Company hereby incorporated, the several and respective sums advanced by them, with the interest thereon, rateably and in proportion one with the other, and without preference the one above the other of them, and in all other respects the provisions in the said Companies Clauses Consolidation Act, 1845, relative to mortgages and bonds, shall be applicable and extend to the mortgages and bonds hereby authorised to be granted."

By the 33rd section, it is enacted, "That it shall be lawful for the mortgagees or bond creditors of the Company hereby incorporated, to enforce the payment of the arrears of principal and interest due on any such mortgages or bonds, by the appointment of a receiver; and in order to authorise the appointment of such receiver, in the event of the principal money due on such mortgages or bonds not being duly paid, the amount owing to the mortgagees or bond creditors, by whom application shall be made, shall not be less than 25,000*l.* in the whole."

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that the bond-holders and mortgagees had priority, and that the demands of simple contract creditors were subject to the then existing charges: *Whitworth* v. *Gaugain* (a). The Court has power to appoint a receiver of a railway, and will exercise its jurisdiction in the same manner as it has done in respect of coal mines, of theatres, and of West India plantations: *Jefferys* v. *Smith* (b), *Ex parte Ford* (c), *Waters* v. *Taylor* (d). We do not contend that the receiver has more powers than those conferred on him by the Act of Parliament. The receiver cannot take possession of the stock, so as to stop the railway, but he may of everything that is not required for that working; the railway is specifically charged by the Act with the payment of the principal and interest due to the bond-holders and mortgagees. The plaintiff had no remedy at law; his remedy under the Act is by the appointment of a receiver. There is no weight in the allegation, that the Company consented to the appointment, they could not have done otherwise; for they had no more ground for opposing it, than they had to oppose the Judge's order obtained by the petitioners.

Again, the prayer of the petition concedes the right of the plaintiff to a receiver; for, it is a part of that prayer, that the receiver might pay the petitioners their demand. The bond-holder can only take the tolls, and enter on the property of the Company; he cannot proceed at law, nor take possession of the land: *Pontet* v. *The Basingstoke Canal Company* (e). If the rights of the petitioners, and of the plaintiff to the suit, are so doubtful, the petitioners must institute a suit for the purpose of getting the declaration of the Court as to their rights; but they cannot come here on an interlocutory application to establish those rights.

(a) 3 Hare, 416; *S. C.*, Cr. & Ph. 325.
(b) 1 J. & W. 298.
(c) 7 Ves. 617.
(d) 15 Ves. 10.
(e) 3 Bing. N. C. 433.

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Mr. *Parker* and Mr. *Goodeve* for a bond-holder, whose principal debt was not due, but whose interest was in arrear.—The receiver appointed by this Court is a receiver on behalf of all parties, and in this differs from the receiver provided by the statute, who only acts for the person appointing him. It is necessary that all the bond-holders should be parties to the suit: *Mellish* v. *Brooks* (*a*). The petitioners are not willing to admit the validity of the order in the present suit, and can have no benefit under it: the only relief they can get from the Court, as they repudiate altogether the present proceedings, is to file a bill: Mitf. Pl. p. 94, ed. 4.

Mr. *Malins* and Mr. *Martindale*, for other bond-holders of the Company, contended, that the effect of the specific lien created by the Acts in favour of bond-holders, was equivalent to a bill of sale, which could not be affected by an after-levied execution: *Martindale* v. *Booth* (*b*).

Mr. *Pryor* and Mr. *Dickinson* appeared for other defendants, whose bonds and mortagages were not yet due.

Mr. *Wood* and Mr. *Rogers*, who appeared for a mortgage creditor, to whom an arrear of interest was due, but whose principal money was not yet due, cited *Dumville* v. *Ashbrook* (*c*).

Mr. *Calvert* and Mr. *Bagallay*, on behalf of the Company, denied collusion with the plaintiffs.

Mr. *Rolt*, in reply, cited *Perkins* v. *The Deptford Pier Company* (*d*).

The LORD CHANCELLOR.—This case having occupied a very considerable time, I have had sufficient opportunity during the progress of the argument of forming my opinion upon it; and it does not appear to me to require any longer

(*a*) 3 Beav. 22.
(*b*) 3 B. & Ad. 498.
(*c*) 3 Russ. 98, n.
(*d*) 13 Sim. 277.

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consideration than I have already given to it. The question in contest between these parties turns upon the construction of certain clauses in two Acts of Parliament, viz. the Companies Clauses Consolidation Act (8 Vict. c. 16), and the special Act under which the present Company, the East Anglian Railway Company, is established, the material sections being the 36th, 41st, 42nd, 43rd, 44th, 53rd, and 54th of the Companies Clauses Consolidation Act, and the 32nd and 33rd sections of the special or Company's Act (*a*).

Now, it does not appear to me necessary to advert to a great many of the topics which have been brought before me in argument, as illustrating the views which the various counsel have taken. I have looked into all the authorities which have been cited; but it will not be necessary, in order to explain the grounds of my judgment, that I should go through them. The petitioners complain that a receiver has been appointed in this suit by arrangement between the parties to the cause; and the ground of their complaint is, that the effect of the arrangement was to surprise or mislead the Court into making an order for the express purpose of impeding the petitioners in ther legal remedy; they insist that the plaintiff was not entitled to this order, and that the Court would not have made it if the facts had been disclosed, as they assert they ought to have been; and they therefore pray that they may be permitted to pursue their legal remedy, notwithstanding the existence of the order. The respondents, on the other hand, insist that the plaintiff was well entitled to the order which is complained of, and that therefore there was no impropriety in the Company giving their consent to that order being made; and they insist that they were well justified, for their own protection, in expediting the proceedings, for the purpose of intercepting the petitioners' execution.

(*a*) The 32nd & 33rd sections of the special Act are set out, ante, p. 535.

Now, the ground on which it is contended that the receiver was properly appointed is, that in this suit the plaintiff was a bond creditor of the Company, and that the defendants appeared on behalf of themselves and the rest of the bond-holders and mortgagees of the Company. It is then insisted, that, under the provisions of the Act, 8 Vict. c. 16, and the special Act of the Company, the mortgagees and bond creditors acquired a specific equitable lien on the tolls, estate, and effects of the Company; and that the bill filed in this case, and the appointment of the receiver, were proper and accurate proceedings, with a view of enforcing and rendering effectual that security.

There are thus two questions to be decided: the first being, whether, upon the construction of the statutes which I have mentioned, a specific equitable lien is given to the mortgagees and bond creditors of the Company upon the estate and effects generally of the Company; and the second, whether, if upon the construction of these Acts no such lien is given, will or not the absence of such lien entitle the petitioners to any and what order on the present application. The principal clause on which the first question depends is the 44th section of the Companies Clauses Consolidation Act, the point being, whether a specific lien on the general effects of the Company is thereby given. It will be observed, that that section does not specify any particulars on which the lien is to attach; it says generally, that the parties are to be entitled to be paid out of the tolls, property, or effects of the Company. Now, of course, if the parties were to be paid at all, they must be paid out of the tolls, property, or effects of the Company, for those were the only sources which could enable the payment to be made; it is therefore in effect saying that the Company are to pay out of their means. There must, I conceive, have been a reason for inserting this clause; and first of all, let us consider the case of the mortgagees. The mortgagees having had certain rights given to them

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by the 42nd section, and the bond creditors having also had certain rights given to them, this 44th section, which applies to bond creditors, might have been intended, as it appears to me, rather to limit than to extend their remedies. For it might be intended to shew that the bond creditors were not entitled to all the remedies which had been previously given to the mortgagees. Such might have been one of the objects for the insertion of the clause, but it must be construed in connection with the 36th section of the same Act, and the two sections must be taken together. The 44th section says, "the respective obligees of the bonds shall be paid out of the tolls or other property or effects of the Company;" the 36th section, which has a sort of preamble to it, to the effect, that it is intended to apply to the general creditors of the Company, is in these words: [His Lordship here read the section.] We have thus one clause stating that the bond-holders are to be paid out of the tolls or other property or effects of the Company; and another clause, which says that creditors shall have the remedy of levying an execution against the property or effects of the Company.

These two sections are to stand together; but can they stand together consistently with the 44th section, giving an equitable lien, which was intended to protect the estate, property, and effects of the Company against other creditors? I do not apprehend that it can be said that the 36th section, which is intitled as applicable to the remedies of creditors generally, must not be extended to mean mortgagees and bond creditors. The Act is framed on steps:—first of all it begins by the 36th section as to the remedies of creditors generally, not at all referring or limiting its operation to any particular class of creditors; then having dealt with the creditors of the concern generally, and given them a right to levy execution upon the property or effects of the Company also without limitation, (and if the argument on the part of the plaintiff be

correct, there could be no property and effects of the Company which would be properly amenable to an execution), it then comes to the mortgagees and bond creditors, and it gives specific remedies to each of these classes of creditors. The meaning and intention then of the 44th section, I apprehend, was to prevent any argument, that the rights and remedies of the bond creditors therein referred to as having certain particular remedies were limited to those remedies; and the effect of it was to shew that the bond creditors were at liberty to pursue their legal or equitable remedies, if they had any, against the property or effects of the Company, in common with all the general creditors of the Company, as well as being entitled to any particular remedies which might be given to them in terms. Now, although it may not be very safe to argue upon any particular intent with reference to these clauses, yet it is to be remarked that a remedy given to the general creditors against the property and effects of the Company is inconsistent with the whole property and effects being made subject to a specific equitable lien on the part of any particular class of creditors. It is obvious, also, that these Companies cannot be carried on without large credit being given; and if so, the legislature could never have intended to exclude the general body of creditors from all remedy for their debts, by giving a specific lien on the whole estate and effects of the Company to a particular class of creditors. It is, however, said that although there may be difficulty in contending, that while the property remains in possession of the Company, and is being used for the purposes of the Company, it may not be dealt with notwithstanding the lien; yet that effect may be given to the plaintiff's construction of the Act, by allowing the mortgagees or bond creditors at any particular moment to assert their right, and that their right may be inchoate or in suspense until they have asserted it. But what a fraud it would be upon the general creditors to allow

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the Company to contract largely upon the possession and apparent ownership of property, and then to give to the mortgagees or bond creditors the opportunity of asserting their lien, when probably the general creditors had allowed the Company to obtain on credit the largest portion of their stock. Such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this to a great extent is.

It appears to me, also, when I look at the remedies, that none of those which the Act specifically provides are, for the reasons I shall state, at all applicable to the case supposed. One remedy given is by a receiver, and it is most material to attend to the manner in which that receiver is provided for. First, it will be observed, that the receiver who is mentioned in the Act, when obtained, is not to oust any other remedy at law or in equity which the mortgagees or bond creditors may have. They may proceed at law and get execution, and that looks as if there were something which was intended to be seized independently of what the receiver was to take, viz. the tolls and sums of money, &c. Now the execution could only be levied on the chattels, and thus the mortgagees and bond creditors have this great advantage over the general creditors, that they have a fund which the general creditors cannot take, viz. the tolls and sums of money, &c., and may take also in common with the general creditors, by an action at law, if an action is maintainable, as to which I do not think it material to inquire. It does not, however, appear to me consistent with the fact of giving a receiver over the property for a particular purpose, that the property should be already subject to a lien on the part of the class of creditors to whom the several remedies are given.

It is material to advert to the 54th section of the Companies Clauses Consolidation Act, which shews how the receiver is to be appointed by the justices, and points out what

he is to do on being so appointed. In the first place, all the tolls and sums of money "shall be paid to and received by the person so to be appointed, and the money so to be received shall be so much money received by or to the use of the party to whom such interest or such principal and interest, as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed; and after such interest and costs, or such principal, interest, and costs shall have been so received, the power of such receiver shall cease." This is a short remedy given for a receiver, and a short and distinct duty for him to perform.

But it is said, that by the 33rd section of the special Act, which I shall come to presently, there is another receiver pointed at. Were there then to be two receivers, one receiver appointed by the Court of Chancery, and another by the Justices? If there were, I certainly should have expected some regulation, some clause or section by which to work out so anomalous a provision, but there is none. When, however, this 33rd section is looked at in connection with the 53rd and 54th sections of the Companies Clauses Consolidation Act, it will be seen that the only receiver which is contemplated is the justices' receiver.

In the next place, the claim set up of a specific equitable lien is so extraordinary, as connected with property of this nature, that it is most unreasonable to suppose that the right to it should be left to be inferred from a mere statement that payment was to be made out of the estate and effects of the Company. It is not likely that the Acts of Parliament, by which these Companies are constituted, and which are framed by the Companies themselves, should be so prepared by them as to give the bondholder a lien on every spade or barrow which the Company may possess. It would be a stigma on a Company, inviting subscribers, and before any credit in fact existed, to insert a clause into their Act depriving them of the power to contract on credit. It is material, however, to

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turn to what has been mainly relied upon, viz. the 32nd section of the special Act. The 32nd section provides that the respective mortgagees and bond creditors shall be entitled to be paid out of "the tolls and other estate and effects of the Company." The 44th section of the Companies Clauses Consolidation Act says, that the obligees of bonds shall "be entitled to be paid out of the tolls or other property or effects of the Company." What difference is there between these two clauses? the one is merely a re-enactment of the other. The 32nd section associates the mortgagees and bond creditors together, and, as to its operative part, directs that they are to be paid out of the tolls and other estate and effects of the Company. The only difference thus is, that the mortgagees are added, and the word estate is substituted for the word property, which is the term used in the 44th section of the Companies Clauses Consolidation Act; and that is a difference which I do not think applicable to the present case. I think the effect is generally to declare that the rights of the mortgagees and bond creditors are not limited to the specific remedy of a receiver given to them in the Companies Clauses Consolidation Act, but that they are also to stand as general creditors entitled to all those remedies against the estate and effects of the Company to which other creditors are entitled. It appears to me, therefore, that an effect is sought to be given to the 32nd clause which is by no means justified.

Then comes the question with regard to the 33rd section of the special Act, which has relation to a receiver. It enacts, that it shall be lawful for the mortgagees and bond creditors to enforce payment by the appointment of a receiver; but not one word is said as to his duties, how he is to be appointed, how he is to be discharged, how long interest is to be in arrear, or what notice is to be given. The reason for this is obvious, that all these matters were contained in the 53rd and 54th sections of the Companies Clauses Consolidation Act; and the clause in ques-

tion does nothing more than supply certain blanks in those sections. These three sections then are to be taken as one and the same enactment. Now the 33rd section of the special Act does not say how long interest is to be in arrear (could it be intended, that, if it was one day in arrear, the remedies would arise?) but the 53rd section of the Companies Clauses Consolidation Act specifies thirty days. Then, again, the 33rd section of the special Act does not say how long the principal is to be due before the remedy shall accrue; but the 53rd section of the Companies Clauses Consolidation Act fixes the time at six months after the principal has become payable. So it is also to be observed, that, in the 53rd section there is no sum mentioned for warranting an application for the receiver. The words there used are:—"If his debt amount to the prescribed sum," referring to the special Act where the sum is to be filled up in each case; and the 33rd section of the special Act here states it to be 25,000*l*. In short, taking any one of these sections abstractedly, it becomes quite useless. I therefore consider that the 33rd section of the special Act does no more than give to the mortgagees and bond creditors the benefit of the 53rd and 54th sections of the Companies Clauses Consolidation Act, filling up those blanks which are essential to give them effect. It thus seems to me, that there is no ground for contending that this clause (the 33rd) carries the remedy against the estate and effects of the Company any further than was done by the previous clause (the 32nd). Now, this bill is filed upon the equity of a supposed specific lien; and in the course of the argument it has been substantially, and, I think, in terms shewn, that, if there was no such lien, there was no foundation for the bill. It appears to me, that it is quite inconsistent with the whole purview of the special Act, to suppose any such specific lien was intended to be given; and that, therefore, this bill has no equity upon which the remedy sought could be founded; and that the order which was made ought not to have been

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made, and would not have been made, if, instead of being obtained by arrangement between the parties to the suit, the Court had been made aware of all the circumstances. The Court at the time was not aware that the receiver which was asked for, was asked for with the view, or would have the effect, of interfering with the rights or remedies of other persons.

Under these circumstances, the question that remains is, what ought to be the effect of this opinion on the present application, and to what consequences will it lead? I dare say that the parties fully believed, at the moment, they were entitled to do that which they were doing; and I do not suppose they intended to commit any fraud, or thought that they were doing more than running a race with another creditor; and that they were perfectly entitled to reach the goal first, if they could do so by legal means. They would, however, have acted with greater caution, considering that the question depended on the construction of these Acts of Parliament, which can hardly, I think, be said by any one to be free from doubt, if they had stated the question to the Court. The execution creditors say, if there is no equity disclosed in this bill, and if this order has been obtained not upon the judgment of the Court but by the consent of the parties, and the Court shall now be of opinion, that, if the circumstances had been brought under its notice, it would not have been granted, that an order so obtained ought not to be allowed to interfere with and impede their legal right. It is said, however, on the other side, that, even supposing the petitioners to be right, still they ought not to have the relief they ask in the present shape. It is said, that they ought to file a bill, or that they should be heard *pro interesse suo*. Although I am much impressed with the importance of forms to secure the due administration of justice, and to prevent that arbitrary course of decision for which the absence of form gives too much opportunity, and which those who are so anxious

to dispense with all forms do not sufficiently appreciate and perceive, still I should never be desirous to adhere to form where the purposes of justice do not require it. In the present case, there are no facts suggested as necessary to be ascertained by further inquiry, nor any materials required in order to enable the Court to pronounce its judgment; and I therefore do not think that I interpose summarily or hastily, in declaring that the order made ought not to stand in the way of the execution creditors. I say so, because I have had full opportunity during the argument of considering the effect of the Acts of Parliament and of the different authorities, and because I do not believe any further or better materials can ever be presented to the Court.

I consider that the cases which have occurred warrant me in saying that this order ought not to be allowed to interfere, as I before stated, with the execution creditors. I think that the principles laid down in *Dixon* v. *Smith* (*a*), *Evelyn* v. *Lewis* (*b*), *Drewry* v. *Thacker* (*c*), *Attorney-General* v. *Mayor of Coventry* (*d*), and *Gooch* v. *Haworth* (*e*), entirely warrant me in saying that the case is now ripe for my decision upon the question between the parties. In the case of *Gooch* v. *Haworth* (*e*), it appears, that, a receiver being in possession for the benefit of the tenant for life, there was an execution creditor who petitioned to be at liberty to levy, and the Court thought that, notwithstanding the existence of the receiver, who, though in possession as the officer of the Court, was in possession for the benefit of a particular party, it was not consistent that that circumstance should be allowed to interfere with the prosecution of a legal remedy against the party.

The principle of that case, and of the other cases to

(*a*) 1 Swanst. 457.
(*b*) 3 Hare, 472.
(*c*) 3 Swanst. 529.
(*d*) 1 P. Wms. 306.
(*e*) 3 Beav. 428.

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which I have referred, is this, that where a Court has granted a receiver, and where a writ of sequestration has issued, and in other cases where an application can be made which brings distinctly before the Court all the materials which the most lengthened and expensive inquiry can produce, it is the duty of the Court at once to pronounce its opinion. It appears to me that the present case is in that situation; and I therefore think, notwithstanding the existence of the order obtained under the circumstances I have mentioned, the execution creditors may be at liberty to levy their execution on certain conditions.

Now, it is obvious that the execution creditors may do a great deal of mischief without a corresponding advantage to themselves; my judgment also may turn out to be erroneous; I therefore wish to protect the parties from the consequences of such an error, and not to inflict an irremediable mischief by a decision which, though not hasty, may be mistaken. I therefore suggest, that the order for bringing the property into the county should be continued for four weeks; and I do it with this view, that in the mean time the plaintiff or others may have the opportunity of applying to the Court to stay the levying of the execution, upon an undertaking to pay the amount, if upon the further order of the Court it shall be so directed; that will also give the opportunity of appealing, if the parties desire to do so, against the order I now make, and it will secure the petitioners, which is all I think I ought to do. If I allow them to levy at once, it is because I do not see that I can make them secure, in the event of my opinion being correct, by any other mode; but if I can do so after giving an opportunity of reviewing the decision I now arrive at, that is the course I shall take, because I shall secure justice to them, without doing unnecessary injury to those whose interests are equally at stake. It appears to me that that which I am suggesting cannot ope-

rate at all unjustly or oppressively upon those who may come under its influence, because if the petitioners are allowed to levy on and sell the engines and other property of the Company, the Company and the mortgagees and bond creditors will sustain a loss; but if the receiver is allowed to remain in possession, the Company can sustain no injury by undertaking to answer for the value, which value may be agreed upon between the parties.

I have passed by the arguments which have been addressed to me founded on public policy and many other considerations, because, however cogent they may be, they are not arguments that can avail the petitioners as giving them any right. At the same time, having considered the arguments, and the Acts of Parliament, I think it is worthy the attention of the parties themselves, to weigh well whether they can safely go on in their present course; and I think that the receiver ought to be well advised as to his position. I do not enter particularly into the reasons, because I think it might be attended with disadvantage; it might call the attention of some persons to a power of doing mischief, which is not to be desired. The parties will also have the opportunity of considering whether it is desirable to adopt the suggestion I submitted to them of turning the questions raised into a special case (*a*). Supposing that to be done, my judgment may be entered upon the special case to the following effect: that is to say, that the estate and effects of the Company were liable to be taken in execution at the time the sheriff seized; that the order for the receiver ought not to have been made; and that the execution creditors ought to be permitted to levy, notwithstanding that order.

[Some discussion here took place as to the form of the

(*a*) His Lordship, in the course of the argument, suggested, that the present question might well be presented to the Court in the form of a special case, under V. C. Sir George Turner's Act.

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order to be drawn up, and it was arranged that the case should be again mentioned upon the minutes.]

The order which was finally drawn up after discussion between the parties was in the following form:—

Dec. 20th. His Lordship being of opinion that the petitioners ought to be at liberty to levy upon the goods and chattels of the defendants, the East Anglian Railway Company, the amount of the judgment recovered by them against the Company, as in the petition mentioned, notwithstanding the possession of the receiver appointed in this cause, doth order that the petitioners be at liberty to levy accordingly, under the writ of fieri facias already issued, or to be issued, upon the said judgment, unless the sum of 1400*l.* be paid into the Bank to the credit of this cause within one week from the service of this order on the plaintiffs' solicitors in manner herinafter directed. And it is ordered, that such sum, if paid into the Bank, be placed to an account, to be intitled "The account of the petitioners, John Bowes, William Hutt, Nicholas Wood, and Charles Mark Palmer." And it is ordered, that William Seppings, the receiver, appointed in this cause, be at liberty to pay the said sum of 1400*l.* into the Bank, to be there placed to the credit of this cause to the said account. And for the purpose of allowing any of the parties an opportunity of appealing to the House of Lords against this order, if they shall be so advised, it is ordered, that such sum of 1400*l.* do remain in the Bank as aforesaid, subject to the further order of this Court; but in the event of any of the parties being advised to appeal as aforesaid, such appeal is to be prosecuted without wilful delay. And it is ordered, that the plaintiff William Russell do pay to the petitioners John Bowes, William Hutt, Nicholas Wood, and Charles Mark Palmer, their costs of this application, such costs to be taxed by the Taxing Master of this Court in rotation, in case the parties differ about the same. And this order is to be without prejudice to all questions as to the parties by whom such costs, and also the costs of the several parties who have appeared upon this application, shall be ultimately borne and paid; and any of the parties are to be at liberty to apply to this Court from time to time as they shall be advised.

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BEFORE THE LORD CHANCELLOR.

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THIS was a motion to dissolve an injunction granted by his Lordship, V. C. *Cranworth*. The order made was to restrain the defendant from taking any proceedings against the plaintiffs under the notice served by him as hereinafter mentioned, and from taking any proceedings at law against them, except under the direction of the Court, to recover the sum of 1250*l.* claimed by the defendant in his notice as for compensation in respect of the alleged injury or damage to the premises and hereditaments mentioned in the notice, and of the interest of the defendant as mentioned in the said notice, or otherwise; liberty being given to the defendant to bring an action against the plaintiffs, the plaintiffs admitting in such action that the defendant had given notice in writing to them, and had by such notice stated the nature of his interest in the premises in question, and had claimed the sum of 1250*l.* as compensation, by reason of the premises being injuriously affected by the execution of the works of the plaintiffs; and had also desired to have the same settled by arbitration, and had duly appointed his arbitrator according to the provisions of the said statute; and the plaintiffs also admitting, for the purposes of the said action but not otherwise, that they did not, within twenty-one days after such notice, pay the said defendant the sum of 1250*l.* so claimed, or enter into a written agreement for that purpose, and did refuse to settle the same by arbitration, or to issue their warrant to the sheriff to summon a jury for settling the same according to the provisions of the said statute in that behalf; no proceedings, however, to be

The lessee of an inn and premises, situate near the tunnel of a railway, was prevented by the vibration caused by the passing of the trains, from keeping his beer in his cellars in a fit state for consumption, and the value of the house was alleged to be materially lessened by the consequent loss of custom, and the impossibility of using it as a public-house. He thereupon gave notice to the Company of his claim for compensation under the 68th section of the Lands Clauses Consolidation Act, and was prosecuting the remedy given by that section, when the Company filed a bill, and obtained an injunction to restrain him from proceeding further under it. The Lord Chancellor, on appeal, however, dissolved the injunction.

Semble, that the sheriff and the jury are authorised to decide, not only the amount of compensation, but the right to it.

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taken on the judgment to be obtained in such action, except under the direction of the Court, with liberty to apply; and if the judgment should be in favour of the defendant, the order was to be without prejudice to the defendant's right, in that case, to require that the amount of compensation should be determined by arbitration, pursuant to his notices.

It appeared from the affidavit of the defendant that he was possessed of certain leasehold hereditaments, situate in Upper Head-row and Temple-street, in Huddersfield, consisting of an inn or public-house, called the Crown Tavern, and several shops, warehouses, dwelling houses, and other buildings. The plaintiffs, in exercise of their powers, in the month of September, 1847, commenced the construction of a certain tunnel, called the Huddersfield tunnel, being part of the railway and works by their Act authorised to be made and constructed; and the line of railway, of which the said tunnel formed part, was opened to the public for passenger traffic only on the 2nd of August, 1849; and that, in about two months afterwards, the plaintiffs commenced the conveyance of goods and merchandise on the line of railway, and through the tunnel, and a large and increasing traffic had ever since been and was then carried on over the same; and that the inn or public house, and other buildings, were very substantial, and were erected several years previously to the construction of the tunnel; that the inn or public-house was erected within a distance of nine feet, or three yards, from the north western extremity of the parcel of ground belonging to him; and that the said space of nine feet was occupied by a causeway belonging to him, and appurtenant to his hereditaments; and that the tunnel was constructed immediately contiguous to and adjoining the north western extremity of his hereditaments; and that in the course of construction the same was, in the first instance, made as an open cutting, and afterwards was arched over to form a tunnel; and such tunnel was made and was then within a few inches of

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the curb-stone of the causeway so belonging to him; and that his hereditaments and his interest therein were damaged and injuriously affected by the construction of the tunnel, and the execution of the works so authorised to be made and constructed; for that the passing of the engines and carriages in and through the tunnel caused a very considerable tremor and vibration in and through the whole of the buildings belonging to him, and especially in and through the whole of the public house; and that, in consequence thereof, on any ale or beer being placed in the cellars of the inn, the same became thick, muddy, and nauseous, and quite unfit for consumption, after having remained in the cellars a day or two; and that the tremor and vibration so caused could be sensibly felt in every part of the inn, and the same was so distinct as to cause the glasses to jingle on the shelves of the bar and on the tables; and that, previously to the construction and use of the tunnel, the inn was well accustomed, and the tenant thereof, who was his brother, was doing a considerable business thereat; but since such construction and use of such tunnel, the business of the inn had declined so much, that the same was valueless as an inn; and that the sole cause of such decline in the said business was the inability of the tenant, from such tremor and vibration, to keep any ale or beer in the premises fit for consumption; and that the tremor and vibration, so caused as aforesaid, could be sensibly felt in almost every part of the said buildings so belonging to him.

On the 6th of December, 1849, the defendant caused to be served on the plaintiffs a notice, that in the exercise of their powers they had made and constructed a tunnel, &c.; and that, by the construction and user of the said tunnel, and the oscillation of the engines and carriages passing through the same, the defendant's hereditaments and premises had been and were damaged and injuriously affected; and stating, also, his title to the said hereditaments; and the defendant gave notice to the plaintiffs, that he required them

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to pay him as compensation in respect of his hereditaments and premises, which the plaintiffs had damaged and injuriously affected, a sum of 1250*l.*; and that, in case the plaintiffs were not willing to pay that sum, he should take the steps mentioned in the notice, to nominate and appoint an arbitrator to ascertain the amount due to him for compensation.

The Company not having paid the sum demanded, the defendant proceeded to appoint an arbitrator, and a meeting was held for the purpose of determining the award. The Company did not, nor did any one on their behalf, attend; but they protested against the proceedings.

The arbitrator made his award, whereby he awarded to the defendant 900*l.* as compensation in respect of his interest, and 239*l.* for his costs of arbitration. On the 1st of June, a rule was made by the Court of Exchequer in the matter of the arbitration, and the plaintiffs were ordered to shew cause. Another rule was afterwards made by the same Court, on the application of the plaintiffs, in the said matter, and it was ordered that the defendant should shew cause. These rules came on to be argued together, on the 4th of November, 1850, when both were discharged without costs. The defendant then served another notice on the plaintiffs, dated 26th of November, 1850, claiming 1250*l.* as compensation in respect of his hereditaments and his interest therein, which the plaintiffs had damaged and injuriously affected by the construction of a tunnel and the execution of the works; and he further gave them notice, in the event of non-payment, that he would proceed to arbitration.

The bill alleged, that the lands and premises, and the interest therein of the defendant, had not been in any manner injuriously affected by the construction of the tunnel or by the execution of the works, nor by the user thereof since the construction of the tunnel and the execution of the works and the completion thereof; and that he was not entitled to any compensation. That the defendant ought not to be allowed to proceed in the manner pointed out

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by his notice, until it had been ascertained, by a Court of competent jurisdiction, whether the defendant had sustained any injury by the construction of the tunnel, &c.

The bill prayed that it might be declared, that the defendant was not entitled to any compensation from the plaintiffs, in respect of the said premises and hereditaments, and of his interest therein; and, also, that an injunction might issue, to the effect of the order hereinbefore stated; and that, if necessary, it might be ascertained, under the direction of the Court, whether the premises and hereditaments, and the interest of the defendant therein, had been damaged or injuriously affected by the construction of the tunnel and the execution of the works, within the meaning of the 6th section of the Railways Clauses, or the 68th section of the Lands Clauses Consolidation Act, and the amount of damage, if any, thereby sustained by the defendant.

Mr. *Bethell* and Mr. *Elmsley*, on behalf of the Company, moved for the injunction before his Lordship the Vice-Chancellor *Cranworth*.

Mr. *Malins* and Mr. *Daniel*, contrà.

The VICE-CHANCELLOR granted the injunction, stating, that he could not see any difference in principle between this case and that of *The London and North Western Railway* v. *Smith* (*a*).

The defendant appealed from the order of the Vice-Chancellor granting the injunction; and the case having been shortly opened by Mr. *Malins*, with whom was Mr. *Daniel*, for the appellant—

Mr. *Rolt* and Mr. *Elmsley*, for the Company, argued, that, under the true construction of the 68th section of the Lands Clauses Consolidation Act, and the 6th section of the Railways Clauses Consolidation Act, the compensation to be given was confined to cases where property was injuriously

(*a*) Ante, Vol. 5, p. 716.

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affected by the construction of the railway, and never was intended to be given for damage or injury consequent on the completion and user of the line when made. That it was not alleged that the defendant had no remedy if he were really injured by the railway, but that he had not the special remedy given by the 68th section. That the word "construction," grammatically interpreted, must mean "the making of the railway."

June 17th.

The LORD CHANCELLOR.—I have a very strong opinion upon this. I took much care and pains in forming my opinion before I delivered my judgment in *Gattke's case*(a); and I think that the principles of that case are applicable to this. It appears to me that the interference of this Court would, in the present case, be in the highest degree mischievous, for it would amount not only to a denial of justice, but to the infliction of positive injustice.

This is a question of pure legal right; the defendant insists, that, under the construction of certain Acts of Parliament, he has sustained an injury, for which they give him compensation. It is the object of these Acts to give compensation in certain cases for certain injuries, and they prescribe the mode in which compensation shall be recovered for these injuries; and while the statutes give a form in which compensation is to be sought, they also in effect deprive the party of all other legal remedy. For, I think I may venture to assert, that in no case in which a man would be entitled to work out his compensation under an Act can he maintain an action. The very circumstance of the Act prescribing a mode of recovering compensation, pre-supposes that the thing in respect of which compensation is given, is authorised to be done under the Act, leaving the parties with all their legal remedies unaffected in respect of any proceedings not authorised by the Act of Parliament. This is, therefore, purely

(a) *The East and West India Docks and Birmingham Junction Railway Company* v. *Gattke*, Ante, p. 371.

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a question of the legal construction of these Acts of Parliament. The legislature having prescribed a certain form of proceeding only, I must suppose, independently of decision, that it conceived, when it created that particular tribunal, that that tribunal was vested with the power of determining whether there was to be compensation or not. The legislature cannot be supposed to have acted upon the presumption that no dispute would arise in these great works, whether parties had sustained injuries or not within the meaning of the Act; it cannot be imagined that it would be supposed that nobody would claim that compensation to which they were entitled, and that the Company would never refuse compensation for what the parties considered they were entitled to.

The Acts, therefore, are framed with a view of giving a mode of trying the claimant's right to compensation and the amount. That they intended to do so, I think, is clear,—first, because they contain no other mode in which a man can pursue his remedy in respect of injury sustained by the execution of the railway works; and, in the next place, because the legislature has thought fit to take away the ordinary remedy by mandamus. I, therefore, should conceive, under the construction and looking at the whole purview of the Acts, that it was intended that the sheriff and the jury (however imperfect the tribunal may seem to be), were authorised to decide, not only as to the amount of compensation, but, also, as to the right to compensation. But, the fact is, that the Courts of law have construed the Acts, in this respect, upon a question which arose in *The Queen* v. *The Lancaster and Preston Junction Railway Company* (*a*), which I referred to in my judgment in *Gattke's case* (*b*). There the discussion was fully entered into, and there the jury thought the claimant had no right to compensation at all; but it having been argued successfully that their province was only to decide how much, they gave a shilling;

(*a*) 6 Q. B. 759. (*b*) Ante, p. 386.

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upon which the Court said, there is as much perjury in giving a shilling as in giving a larger amount; if you are of opinion that there is no injury at all, within the Act of Parliament upon which the facts are proved before you, you are as wrong in giving a shilling as if you gave a larger amount, the amount being indifferent with regard to the question.

This being a claim under an Act of Parliament, that Act of Parliament defines a certain mode by which persons who have claims are enabled to pursue their remedy; and there being only one set of claims, I infer that it was intended that the mode of deciding upon the justness and legality of those claims, set up by those who imagined they had claims, was by the mode pointed out by the clauses to which I have referred. But then it is said the parties may be mistaken, and may set up claims which they have no right to set up. No doubt they may, and no doubt they have, and no doubt they will; but the question is, whether it is proper to come to this Court to decide upon a strictly legal right. Should this Court interfere in cases where the Courts of law have had no opportunity of giving any judgment or opinion with regard to that legal right? If it be a question of legal right, and this Court thinks it proper to interfere and impede the progress of the claim or assertion of that legal right, ought it to do so except where it can decide the matter finally?

The injunction in the present case, following the authority of another case (*a*), does not profess that this Court assumes to itself the right of saying to a claimant, "you shall not go to a Court of law to try whether you have the right which you say that Court of law has given you." It does not say "that a Court of equity will decide the law for you, and prevent your going to a Court of law;" but it says, "you shall only try your right by one mode." The claimant says in answer, "I submit that the mode which is pointed out

(*a*) *London and North Western Railway Company* v. *Smith*, Ante, Vol. 5, p. 716.

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to me raises not only an additional question, but a much more difficult and doubtful one than that you are preventing my going to a Court of law to have decided."

Whether an action will lie on behalf of a man who sustains a private injury by the execution of Parliamentary powers, exercised judiciously and cautiously, is not an easy question, or rather, it is not easy to come to a conclusion that an action will lie. I entertain a decided opinion (probably, however, erroneous), that no such action will lie. I do not entertain anything like so decided an opinion, that a claimant may not work out his claim in the way in which he proposes to do—he may or may not; it is well worthy of his consideration, looking at the very imperfect manner in which these Acts are prepared—taking the two Acts together—taking the 6th section of the 8 Vict. c. 20, which refers to obtaining compensation for certain matters, and speaks of compensation by reason of the exercise of certain powers given by the special Act, whether, when you come to compare the compensation which the parties under the 6th section are entitled to, with the particular words which are used in the earlier part of the 68th section, the words do so correspond as to make the course by arbitration as safe as the course by jury. That is for them to consider. It may or may not be so; but, at all events, I dare say they are well advised in the course which they have taken.

The main question is, whether this Court can, as I said before, interfere to prevent a claimant from pursuing a legal right by a legal course, it not being imputed to him that there is anything vexatious in it, or that he is making anything more than a fair attempt to obtain the decision of a Court of law upon the claim he sets up. It is clear that the defendant in the present case has sustained an injury, and that too by the operation of an Act of Parliament. He is the owner of a public-house, which is well known generally to be of more value than a house of the same size not used as a public-house. When the landlord comes to sell his

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interest in this house, it will sell for so much the less if people cannot use it as a public-house. Therefore his interest is materially affected, by the value of his property being actually reduced. He cannot sell his house in future for a public-house if the vibration is such that the publican cannot keep his beer in a state fit for his customers. That the man, therefore, has sustained an injury is clear; but, whether it is of such a nature as to entitle him to compensation, or whether it must be borne, with the view of obtaining the larger benefit to the public, is another circumstance. It may or may not be so; but, at all events, a man has a right to take the opinion of a Court of law (his injury having been caused by that which could not have been done safely without the powers of an Act of Parliament,) whether Parliament has or has not given him compensation. Then, while pursuing that mode (having undoubtedly sustained an injury), the Company come and pray that he may not be allowed to pursue the course which, although it may be difficult to determine, he is advised is the right one, and it is not pretended is a vexatious course. He, however, acting by the advice of those he chooses to consult, presents his legal claim in a certain form; the Company say, "This is an inconvenient form for us, we beg he may not be allowed to pursue this form; we do not object to his going to a Court of law, but do object to his going on in this mode." Then is this Court to preclude him from proceeding in any but one mode, which mode, it has been said, is more doubtful a great deal than the one he has adopted. Does the Court accomplish the object for which it is asked to interfere? It is not pretended that this Court is to prevent a claimant altogether from going to a Court of law; but it is asked to permit him to take one course, and to restrain him from taking any other, because it is more beneficial to the plaintiffs. Now, I will suppose that he goes on in his own course; he gets his arbitration; he gets his award for a certain sum; he then

brings his action, and in his declaration upon the award for the money, the Company do that which, in *Gattke's case*, you will find has been done; they either plead or demur to the declaration, according to whether it sets out—which I apprehend it must do—enough to shew that the award is warranted under the Act; suppose they demur to the declaration, then, if they are wrong, there is judgment for the plaintiff. In the mean time, the plaintiff will have had the trouble of going before a jury and assessing the compensation. Now the Court in that way would arrive at this conclusion by a judgment on the demurrer of the Company, unless they thought fit to bring a writ of error in the Exchequer Chamber, or to go to the House of Lords.

Now take the other course: In the present case, I am to stop the defendant from proceeding in that way, although it is one in which, if he turns out to be right, he must eventually go. It is not that I am to leave him open to a course which is finally to determine his right, and in which, if he establishes his right, he will get the compensation connected with that right; it is not that it is clear the action would be the proper mode of assessing his compensation,—Parliament having pointed out the mode in this case, by arbitration—he is, however, to bring his action; then he is to try that action. He, being merely an individual, has only to obtain a decision on his own case; and the extent to which it is expedient for him to go, looking at his own interest, in litigation, will be measured by his own circumstances and the extent of the injury in the particular case. But the Company have more funds at their disposal than he has. They are not only interested in the trial of one case, and perhaps the construction of the Act as to this particular case will be perfectly insignificant compared with all those involving the same question; they therefore have an interest to go into a greater extent of litigation than he has. I shall, there-

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fore, take care that I do not put a claimant in a situation to contest a question with a powerful body and a powerful purse, he being dependent on his own means; they having great and important rights, he having only very limited rights, it may be to the extent only of a few pounds. I will suppose the claimant brings his action; the Court decides he has a legal right, the Company consider the decision important in respect of other cases, and they take him to the House of Lords. Look at the delay, look at the expense, the claimant is put to, supposing he is right, or supposing he is wrong. Then he is to come back to this Court, having got his judgment on writ of error, and to say, "Now let me pursue my arbitration." Is it to be one or two years, or more, before he gets back here, after having gone through the course I have pointed out? I will suppose he has not followed it; that I have turned him into the wrong road, and into a cul de sac, out of which he cannot escape; or I will suppose that it is not so, that he has gone on and established his right; he has then to begin all over again.

Which of the two courses, then, is the least oppressive to either of the two parties? I think it is the most oppressive, and that the Court has no right, and that it is not within its ordinary jurisdiction, to say to a man, "You shall not pursue that legal course to try your legal right which you are advised is the proper course, but I will prescribe to you a certain course, which may be wrong or which may be right." And this remark particularly applies to a case where the legislature has professed to deal with the subject.

The Acts are most imperfect. When they took away the mandamus, and prescribed this mode, they undoubtedly did a considerable injury and inconvenience. Besides, although the mandamus was open to considerable difficulty —because there might be a return to the mandamus, there might be an action for false return, and there might be

all the consequences—yet, generally speaking, and practically, people were satisfied with the judgment of the Court upon the mandamus, and did not go further. The whole Act is framed, undoubtedly, very imperfectly, and in a manner not calculated to effect justice as between the parties. But upon the ground that this Court has not the power—the legitimate power, I mean—finally to decide the legal right, (Parliament having chosen to give a certain mode of proceeding for the purpose of trying that right), or to impede the individual and prevent his pursuing that right, I think I cannot do so, even for the purpose alone for which I am asked, viz. to prevent expense, to prevent delay, and generally for the benefit of the parties. I therefore think that the party must pursue his remedy, according as he is advised, under the Act; and that the Company have full and perfect means of defence. If it turns out in the result that the claimant is entitled, I think the Company will sustain much less injury and expense than they would if I were to grant what they ask. I think the defendant is entitled by law, and in justice, to pursue his legal right, according as he is advised; and it is no part of my duty to advise him. It is only my duty to prevent vexation, if not the perversion of the law to a case to which it was never intended to be applied under the circumstances.

I therefore think the injunction must be dissolved, and the defendant left to his legal right.

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COURT OF EXCHEQUER.

Hilary Vacation, 1850.

Feb. 14*th* & 25*th*.

THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY *v.* PILCHER.

Debt for calls.—Plea, that, at the time when the defendant first became the holder of the shares, and at the time of his making the contracts by virtue of which the debts, causes of action, and liabilities accrued to the plaintiffs and were incurred by the defendant, and at the time of his making and entering into the contracts, by virtue of which the plaintiffs claim to be entitled by law to make the call upon the defendant, he was an infant. Replication, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of full age.

It appeared that the defendant became the purchaser of the shares whilst he was an infant, but that the call was made after he attained his full age:—*Held*, that the term "contract," meant the contract by which the defendant became a shareholder, and that the plea was proved (*a*).

DEBT for calls.—The declaration stated, that the defendant was and still is the holder of divers, to wit, 130 shares in the said Company, and, being such holder, was and still is indebted to the said Company in 292*l.* 10*s.* in respect of a call made on each of the said shares; whereby an action hath accrued to the plaintiffs, by virtue of the Companies Clauses Consolidation Act, 1845, and the Birkenhead, Lancashire, and Cheshire Junction Railway Act, 1846, to demand &c.

Plea—That, at the time when he the defendant first became and was the holder of the said shares; and at the time of the making and entering into by him the defendant of the contracts, by the force, virtue, and in pursuance of which the debts, causes of action, and liabilities, and each and every of them, in the said declaration mentioned, have accrued to the plaintiffs, and been incurred by the defendant, as in the said declaration is alleged; and at the time of the making and entering into by him the defendant of the contracts, by the force, virtue, and in pursuance of which the plaintiffs claim to be entitled by law to make the said call upon the defendant, and to demand and have

(*a*) The plea has since been held to be bad in arrest of judgment, see post, p. 622.

the amount of the same of and from the defendant in manner and form as in the said declaration is alleged, he the defendant was an infant, within the age of twenty-one years.—Verification.

Replication—That the defendant, at the time when he first became and was the holder of the said shares in the said declaration mentioned, and at the time of the making and entering into by him the defendant of the said contracts and every of them in the said plea mentioned, was of the full age of twenty-one years, and not within the age of twenty-one years.

The cause was tried at the Chester Summer Assizes, 1849, before *Maule*, J., when it appeared that the defendant came of age on the 7th of April, 1848; and that the shares in question were transferred to him on the 1st of March preceding; that, on the 21st of May, 1848, a resolution was made for a call, which was, on the 24th of May, announced to the defendant by a circular requiring payment on the 16th of June. Under these circumstances, it was contended, on the part of the plaintiffs, that the plea was not proved, as the "contract" therein mentioned meant the obligation to pay, which did not arise until after the defendant had attained his full age. The learned Judge directed a verdict for the plaintiffs for 310*l.* 14*s.* 6*d.* giving the defendant leave to move to enter a verdict for him.

A rule nisi having been obtained by *Willes*,

Welsby and *Townsend* shewed cause.—The allegation, that the defendant "is the holder of shares," means that he was so at the time the call was made: *The Belfast &c. Railway Company* v. *Strange* (*a*). The contract arises out of the resolution, which is the call: *Ex parte Tooke* (*b*); and

(*a*) 5 Railw. Cas. 548; 1 Exch. 739.

(*b*) 6 Railw. Cas. 1; 18 L. J., Q. B., 343.

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the plea must be taken to refer to that contract for the breach of which the action is brought. The plea does not allege any repudiation by the defendant. [They cited *The Cork and Bandon Railway Company* v. *Cazenove* (a), *The Newry and Enniskillen Railway Company* v. *Coombe* (b), *The Leeds and Thirsk Railway Company* v. *Fearnley* (c).

Willes and *F. Brandt*, in support of the rule.—The issue raised on the plea is, that, at the time of making the call *and* at the time that the defendant became a shareholder, he was of full age. The plaintiffs were bound to prove both allegations, which they have failed to do. [*Parke*, B. —If the contract mentioned in the plea is that which the defendant entered into when he purchased the shares, the plea was proved; but if it be the contract which arises out of the Act of Parliament, then it was not proved.] The effect of the statute is not to impose any new contract, but to transfer to the Company the original contract. The only contract entered into between the parties arises out of the buying of the shares. The object of the 8 & 9 Vict. c. 16, was to enable the Company to call for the money which the original subscribers had contracted to pay; the transferree therefore becomes liable to pay in respect of the original contract. The making of the call creates no new obligation. [*Parke*, B.—Does the Act of Parliament render the shareholder liable by virtue of a parliamentary contract? if so, the defendant is liable; but if the term "contract" means "actual contract," then there is no such contract between the defendant and the Company.]

Cur. adv. vult.

May 21*st*. PARKE, B.—This case came before us a few days ago, on

(a) 10 Q. B. 935.
(b) 5 Railw. Cas. 633; 3 Exch. 565.
(c) 5 Railw. Cas. 644; 4 Exch. 26.

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a motion for a new trial. It was an action of debt for a call, alleged to be due to the plaintiffs from the defendant as the holder of 130 shares in the plaintiffs' Company, the call being made payable on the 16th of June, 1848. On the trial it appeared, that, on the 21st of May, 1848, there was a resolution for a call. On the 24th of May, a circular announcing it was addressed to all the shareholders, requiring the amount to be paid on the 16th of June. The transfer of the shares was made to the defendant as a purchaser, on the 1st of March, when he was an infant; he came of age on the 7th of April, 1848. On these facts, the question was, whether the plea was proved. That depends upon the meaning of the term "contract" in the plea. If it means the "contract" by which he acquired the shares from his vendor, there is no doubt that he was then an infant, as well as at the time when he became a holder of the shares, and consequently the plea was proved. If, on the other hand, the term "contract" means the obligation to pay the calls created by the special Act establishing the railway, and the 8 & 9 Vict. c. 16, that obligation did not arise until the time fixed for the payment of the call, and then the defendant was of full age, and the plea was not proved. We think that this obligation, created by statute, cannot be described as a "contract," and consequently that the meaning of the plea is, that he was an infant when the contract was made by which he became a shareholder; and in that sense of the word the plea was proved; the rule must therefore be made absolute to enter a verdict for the defendant. Whether the plea is an answer to the declaration, the word "contract" being so construed, is a question which we need not now consider (*a*).

Rule absolute.

(*a*) The plea has since been holden to be bad, see post, p. 622.

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Easter Term, 1850.

April 26th. GOULD *v.* THE STAFFORDSHIRE POTTERIES WATERWORKS COMPANY.

On a reference to arbitration under the Lands Clauses Consolidation Act, 8 Vict. c. 18, the arbitrators or umpire have no power, in the first instance, to determine anything but the amount of compensation payable by the promoters; but as soon as that is determined under sect. 34, the costs may be subsequently taxed and settled by a separate instrument, and they need not be incorporated in the award. The settlement of the costs need not be within three months after the time of the reference. The 34th section directs the arbitrators, not the umpire, to settle the costs: —*Held*, that the term "the arbitrators" means the persons who make the award, either as arbitrators or umpires.

In debt on the award for the recovery of the compensation awarded and costs, the declaration alleged that the umpire "was required by the plaintiff to settle and determine the costs to be paid to the plaintiff:"—*Held*, on special demurrer, a sufficient averment that the umpire was required to adjudicate upon the costs, and that it was sufficient.

DEBT upon an award, made under 8 & 9 Vict. c. 18. The declaration, after reciting, that before the passing of the Act of Parliament, whereby the defendants were incorporated, the plaintiff was and still is seised of certain lands in the county of Stafford, distinguished in a certain plan and book of reference, which, prior to the application for the said Act, was and still is deposited in the office of the clerk of the peace for the said county, and which said book of reference then and still contains the name of the plaintiff as owner of the said lands; and that the defendants, after the making of the said Act, by authority thereof, determined upon taking a part of the said lands, and an easement over other parts of the said lands, for the purposes of the said undertaking; and thereupon, by virtue of the said Act, and the Lands Clauses Consolidation Act, 1845, they by writing gave notice to the plaintiff, that they required to purchase and take for their purposes the said lands, particularly described in the said notice and on a plan thereto annexed, and the said easement, which was also therein particularly described; and that they were willing to treat with the plaintiff for the purchase of the same from him, and as to the compensation to be made to him for any damage that might be sustained by him by reason of the execution of the works. The declaration, after averring that the defendants were then duly autho-

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rised and empowered by statute to purchase, and that the defendants offered to the plaintiff the sum of 359*l.* 3*s.* 11½*d.* for the purchase of the fee simple of the said lands and the said easement, and for the damages to be sustained by the plaintiff by the execution of the said works and undertaking; that no agreement was come to between the defendants and the plaintiff as to the amount of compensation to be paid by the defendants for the interest of the plaintiff in the said lands and the said easement, or for the damage to be sustained by him; and that the compensation then claimed by him from the defendants far exceeded the sum of 50*l.*; and that the plaintiff was then desirous of having the same settled by arbitration, under the Lands Clauses Consolidation Act: and thereupon the plaintiff, on the 26th of August, 1848, and before the defendants had issued any warrant to the plaintiff to summon a jury in respect of the said lands and easement, signified such his desire by notice in writing to the defendants; and thereupon the defendants, in pursuance of the statute, by a notice signed by two of the directors of the said Company, duly nominated and appointed one J. Leach to be an arbitrator, to settle and determine, in conjunction with an arbitrator to be appointed by the plaintiff, the amount of purchase-money and compensation to be paid by the defendants for the purchase and taking the said part of the said lands and the said easement; and afterwards, the plaintiff, in pursuance of the said Lands Clauses Consolidation Act, by writing, duly nominated and appointed one T. Heaton, to be one of the arbitrators, on his the plaintiff's part, to settle and determine the amount of the said purchase-money and compensation, in conjunction with the said J. Leach, the other arbitrator so appointed; and which said appointments and nominations were duly delivered by the plaintiff and defendants respectively to their respective arbitrators, and thereby, by virtue of the said Lands

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Clauses Consolidation Act, became and were submissions to arbitration on their respective parts; that the arbitrators, before entering on the consideration of the matters referred to them, subscribed the declaration required by the said Act, and by writing under their hands, in due form of law, pursuant to the provisions of the said Act, before entering on the before-mentioned reference, duly nominated and appointed R. S. Ford to be the umpire, to decide on any such matters as to which they should differ, or which should be referred to the said umpire, under the provisions of the said Acts or either of them, proceeded:—"That the said J Leach and T. Heaton enlarged the time for making their award to the 20th of November, 1848, and, on the 1st of October, took upon themselves the burthen of the said reference, but could not agree; and by writing under their hands, on the 15th of November, 1848, submitted to the said R. S. Ford, as such umpire, the matters of the said arbitration; and the said matters then referred devolved upon the said umpire: that afterwards, and within three calendar months after the expiration of the said enlarged time, and within three months after it devolved upon the said R. S. Ford to determine the said matters referred, to wit, on the 13th of February, 1849, he the said R. S. Ford took upon himself the burthen of the said umpirage, and having deliberately examined the witnesses, &c., within the said three months as aforesaid, made and published his award, in manner following." The declaration then stated the award, which found the amount of purchase-money to be paid by the defendants to the plaintiff to be 820*l.*; and then averred, that "the said sum of 359*l.* 3*s.* 11½*d.*, hereinbefore mentioned, was and is a much smaller sum than the said sum so awarded to the plaintiff by the said R. S. Ford, whereof the said R. S. Ford had notice, and was then required by the plaintiff to settle and determine the costs to be paid by the defendants to him the

plaintiff, under the said Lands Clauses Consolidation Act; and thereupon the said R. S. Ford, by an instrument in writing under his hand and seal, duly settled the costs of the plaintiff of the said arbitration, and thereby ascertained and settled the same to be 260*l.*, and did thereby direct the same to be paid by the defendants to the plaintiff; which said award and which said last-mentioned instrument in writing were afterwards duly delivered by the said umpire to the defendants, and they then had notice thereof." The declaration then averred, that the plaintiff was ready and willing and offered to convey to the defendants a good estate in fee simple in the said lands, and to perform all things, and requested the defendants to pay him the said several sums of 820*l.*, 4*l.* 3*s.* 7*d.*, and 260*l.* Breach, nonpayment.

Special demurrer as to so much of the declaration as related to the sum of 260*l.*, that it did not appear that the said umpire had power to settle the costs at all; that he had no power to settle them by a separate and distinct instrument, subsequent to the making of his said award; that it did not appear that he had settled the costs within three months after the matters were referred to him; nor that the instrument in writing was an umpirage or award. —Joinder in demurrer.

Watson, (with whom was *Willes*) in support of the demurrer.—First, if the umpire be the proper person to ascertain the costs of the reference, they ought to have been incorporated in the award; for, after the publication of the award, the arbitrator is functus officio. By the 23rd section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, if the compensation claimed or offered exceeds 50*l.*, the party claiming may signify to the promoters of the undertaking his desire to have the question settled by arbitration. The 25th section provides for the appointment of arbitrators; and the 34th section enacts, that "all the

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costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking." Under this section, the costs ought to be ascertained by the award. In *The London and North Western Railway Company* v. *Quick* (*a*), *Erle*, J., held that the 34th section imposed on arbitrators the duty of ascertaining whether the right of the claimant to costs under that section arose, and, if so, of settling their amount in their award; and that they could not, by a subsequent certificate, entitle the claimant to obtain payment of them: *Morgan* v. *Smith* (*b*).

Secondly, the costs ought to have been ascertained by the *arbitrators*. The 34th section so provides. The appointment of the umpire is only to take place in case the arbitrators differ, see 27th and 28th sections. [*Pollock*, C. B.—The 34th section says, that the costs are to be settled by the arbitrators, does not that mean by the persons who arbitrate?]

Thirdly, the declaration does not allege that the costs were ascertained within three months after the reference, and is therefore bad.

Fourthly, the averment that the umpire "was required by the plaintiff to settle and determine the costs," does not import a proper submission, or that the umpire adjudicated as arbitrator.

Martin, contrà, was not called upon.

POLLOCK, C. B.—The plaintiff is entitled to our judgment. The questions raised are four. The third point is, that the declaration does not shew that the costs were settled by

(*a*) Ante, Vol. 5, p. 520; 5 D. & L. 685. (*b*) 9 M. & W. 427.

the umpire within three months after he had taken upon himself the umpirage; and that so much of his decision as has relation to those costs, is no award within the statute. But, it appears to me, that it is merely a taxation of costs, which, when settled, become a debt. So the fourth objection, that it does not appear from the declaration that the umpire was duly called on to determine the costs according to the statute, or had duly taken upon himself to do so, also fails; for it is stated in the declaration, that he was required by the plaintiff "to settle the costs," that is all that he is authorised to do under the 34th section of the Act.

As to the other points it is said, first, that these costs ought to have been settled by the umpire in his award, he being the person who had to award; and, secondly, that if they may be assessed by a separate instrument, it ought not to be by the *umpire*, but by the *arbitrators*, because the 34th section mentions arbitrators only as the persons by whom such costs are to be settled. These objections are inconsistent with each other. The second can only be taken on the supposition that the first is without foundation; for, if those costs ought to be settled in the award itself, then the other objection never can arise. But, I think, that neither objection is good. I think that the costs were to form no part of the award, but were intended to be settled by a separate instrument. That, I think, is the result of the 34th section. That the object of the Act was, that the compensation for the land taken should be awarded in the first instance, and that wholly irrespective of any question as to what offer had been made for it, or what costs had been incurred; and the arbitrators or the umpire were by their award simply to determine the amount of compensation. That having been decided, the question of costs arises afterwards, and must be determined by the rule laid down in the 34th section, the amount

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being to be settled by the persons or person who make the award, namely, the two arbitrators, if they agreed to make one, and if not, then the umpire.

The case of *The London and North Western Railway Company* v. *Quick* may seem inconsistent with this decision. But the rule there was very properly discharged, it being better that the question raised should be discussed in an action to be brought to enforce the award. By the 34th section, "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters, &c., unless the arbitrators shall award," &c. And it is plain, I think, from the construction of the sentence, that the term "to be settled by the arbitrators," must mean the same person or persons by whom the first award is made; and, on referring to the interpretation clause, sect. 3, the expression "arbitrators" may mean one arbitrator or more. It however clearly means that the person who makes the award shall settle the costs. It is perfectly plain to me, that the umpire who makes the award is the person to determine the amount of costs, which is to depend on whether the award of compensation is for the same or a less sum than that offered by the promoters of the undertaking in the first instance. The sum so actually offered forms no element in the award; but when the sum for compensation has been awarded, it then appears which of the two parties is entitled to costs; if the sum offered by the promoters was the same or a greater sum than that awarded, then each party is to pay his own costs; but if not, then the person who has made the award is to settle the costs, that is, to tax the amount of the claim for costs, and settle the amount so claimed; and when that settlement has been made, the promoters are to bear the costs of the arbitration so settled by the person who made the award.

PARKE, B.—I also think that our judgment ought to be

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for the plaintiff. The first point is, that the arbitrator or umpire, as the case may be, ought to include the taxation of costs in his award; and this was contended for by analogy to the ordinary practice on submissions to arbitration, where everything to be inquired into must be included in the award. But the reason for that arises out of the agreement of the parties to the submission, in which it is generally one of the terms that the arbitrator is to make but one award. That condition is implied in all cases, unless something to the contrary is either expressed in or may be inferred from the submission. But here the sole question is, whether, looking at the several clauses of this Act, the legislature meant that all to be done by the arbitrators or umpire was to be included in a single award or umpirage. I think it quite clear that the legislature did not so intend. By the 23rd section, the only matter referred to the arbitrators is the compensation to be paid for the lands required to be taken for the purposes of the undertaking. They are in truth valuers, not arbitrators, and all they have to do is to ascertain the amount that ought to be so paid. Then the 34th section directs that all the costs of any arbitration are to be borne by the promoters of the undertaking, unless the arbitrators award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case, each party shall bear his own costs incident to the arbitration, and those of the arbitrators shall be borne by the parties in equal proportions; so that the necessity for making the taxation of costs depends entirely on the result of the award, whether a larger sum has been awarded than was offered by the promoters of the undertaking. The arbitrators or umpire have no power in the first instance to inquire what was the amount of the previous tender, or anything beyond the compensation to be made; each question is to be determined separately, the intention of the legislature being, that, so soon as it becomes necessary that the costs of the arbitration should be deter-

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mined by the arbitrators, they shall have the power to tax and settle them by a separate instrument.

The second objection was, that the 34th section requires the arbitrators, not the umpire, to settle the costs. Now the rule always followed in the construction of statutes is to take the words in their grammatical sense, unless some inconvenience or incongruity would result from so doing; and if we are to read the clause, "all the costs of any such arbitration and incident thereto to be settled by the arbitrators," according to its grammatical construction, this inconvenience would follow, that unless the arbitrators have made an award for the sum to be paid by way of compensation, there could be no taxation of the costs at all; for the words are, that the costs are to be settled by the arbitrators, and "unless they award the same or a less sum than was offered by the promoters of the undertaking," &c.: so that, if we were to confine the second part of this section to the case of arbitrators, it would be inapplicable where the umpire is called upon to award compensation. In order to avoid that absurdity, we must read the latter part of the section as if the words were "unless the arbitrators or umpire shall award the same or a less sum than that offered;" and the word "arbitrators" in the former part of the clause must be read in the same way. Besides, the legislature was more likely to leave the arrangements as to the amount of costs to the person who was to adjudicate on the question of compensation.

As to the case of *The London and North Western Railway Company* v. *Quick*, that was the decision of a single Judge, and not that of the full Court. The reasons there given for allowing the second objection in that case are not satisfactory to my mind; and I think that the learned Judge, for whose opinion I have the highest respect, was misled by a supposed analogy to the ordinary cases of reference to arbitration, where the powers of the arbitrators are determined by the submission. But no such inference

can be drawn from the different clauses of this Act; the inference from them is, that the award and settlement of costs are to be by two instruments rather than by one.

As to the last two objections, the first is, that it does not appear that the umpire settled these costs within three months after the matter was referred to him. It is true, the statute requires the award as to the amount of compensation to be made within three months after the reference, but nothing is said about the costs being settled within that time. It is said, that delay in settling the costs may produce inconvenience; but the party entitled to them can at any time call on the arbitrators or umpire to settle them; and whenever the party does so call upon them, they, having accepted the office of referees, are bound to perform the whole of the trust reposed in them. The other objection is, that it is not alleged in the declaration that the parties called on the umpire to adjudicate on these costs; but it does allege that the umpire was called on to settle the amount of costs, and did so. That is all that is necessary.

ROLFE, B.—I am of the same opinion. But for the case of *The London and North Western Railway Company* v. *Quick*, I should have had no doubt that the costs are not to be taxed at all until the award is made. By looking at the amount awarded, and other matters to which the award has no reference, we see the relation between the sum awarded and that originally offered. No doubt, in the case before my Brother *Erle*, there was good ground for discharging the rule; for the question was one which ought not to have been disposed of on motion, but ought to have been made the subject of an action.

PLATT, B., concurred.

Judgment for the plaintiff.

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April 16*th*, *May* 7*th*.

In an action for calls, in order to shew notice thereof to the defendant, the plaintiff proved that it was the course of business for C., a deceased clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put them into a basket for another clerk to post, which he had done on the occasion of this call. A list of shareholders, containing the name of the defendant, was produced in C.'s handwriting, and indorsed by him "Letters sent out." C. had received instructions to make out such list, and had been seen filling up and directing the notices, with such a list before him:—*Held*, that such list so indorsed was admissible as evidence that notice of the call had been sent to the defendant.

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THE declaration was on the deed of settlement of the Company, and stated that the defendant was a shareholder; that a resolution for a call was duly made; that notice thereof was given to the defendant; and nonpayment.

Plea, traversing the notice of the call.

The cause was tried before *Wightman*, J., at the Spring Assizes for Suffolk, 1850. It appeared, that the course of business was, that, when a call was made, a clerk, of the name of Chapman, who had since died, filled up printed notices of the call, and directed them, according to a list made out from the address book, in which the shareholders were arranged in classes A., B., and C., and then put the notices into a basket; another clerk posted those letters. It was proved, that, upon the occasion of this call, he had posted all the letters in the basket addressed to shareholders in Class C. A list of shareholders, containing the defendant's name, was produced, indorsed by Chapman, "Letters sent out." And it was also proved, that he had been directed to make out such list, and that he was seen filling up and directing the notices, with such a list before him. It did not appear in which class of shareholders the defendant's name was. It was objected, on behalf of the defendant, that the list produced, with the indorsement thereon, was not admissible as evidence of the notice having been sent, as it did not appear when the indorsement was made. The document was received in evidence, and the plaintiffs had a verdict, leave being given to the defendant to move to enter a nonsuit.

O'Malley now moved.—This document was not admissible, as there was no proof when the indorsement was made. To make it evidence, it ought to have been shewn to have been a contemporaneous indorsement: Pitt Taylor on

Evid., s. 406; note to *Price* v. *Earl Torrington*, 1 Smith's Lead. Cas. 140. [*Parke*, B.—No doubt the Judge ought to be satisfied that the indorsement was contemporaneous.] But here there was no such evidence; it did not appear that the defendant was one of that class to whom the notices were posted.

Cur. adv. vult.

May 7th.

POLLOCK, C. B.—The question which the Court has taken time to consider is, whether there was sufficient evidence to justify the learned Judge in receiving a list of shareholders in the handwriting and indorsed by a deceased clerk of the name of Chapman. The fact in issue was, whether notice of the call had been given to the defendant. It appeared that a list was made out of persons to whom notice was to be given, and that a list was found indorsed by Chapman as containing the names of the persons to whom he had sent notices; and if that were written contemporaneously with the transaction, there could be no doubt that it was correctly received, according to a class of cases well known in the profession. It was contended for the defendant, that there was a total absence of all evidence that the paper was written within such a period as to be receivable in evidence; but, on looking at the learned Judge's notes, it is clear that, at the time when Chapman was actually engaged in the business of making out the notices, a list was seen in his possession,—such a list as ought, according to the mode of conducting business, to have existed. Subsequently a list was found, corresponding with that, and indorsed by him; and it appears to us, that the learned Judge was perfectly correct in receiving that as evidence. It was for him to decide whether, under the circumstances, the list was receivable in evidence; and we think he correctly decided that it was receivable, on the ground that it was proved to have existed contemporaneously with the transaction; and a list was

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proved at the trial corresponding with that which ought to have existed, and indorsed by the deceased. The evidence was, we think, reasonably sufficient that the list produced was the same list that Chapman had in his possession at the time he made out the notices. It was also objected, that these notices were given to Class C., and that it was uncertain whether the defendant was in Class A., B., or C. It appears to us that that is a matter of indifference, because it was not suggested that there was a different call for the different classes. There was only one call, though, in giving the notices, the shareholders were divided into classes. On these grounds, it appears to us that the proof was properly received, and that the verdict was right.

Rule refused.

Sittings after Easter Term, 1850.

May 22nd. HUTCHINSON, Administratrix of JOSEPH HUTCHINSON, deceased, *v.* THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

A master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant while acting in one common service, provided the master shall have taken due care not to expose his servant to unreasonable risks. But, in such a case, the master is not exempt from responsibility where the servant injured was not at the time of the injury acting in the service of the master.

H., a servant of a Railway Company, in the discharge of his duty, was in a train under the guidance of others of their servants, and by the neglect of those servants, whilst they were engaged together in a common service, a collision took place, and H. was killed:—*Held*, that his administratrix could not maintain an action against the Company under the 9 & 10 Vict. c. 93.

A declaration under the 9 & 10 Vict. c. 93, stated that H. was in the service of the defendants, and that, in the discharge of his duty as such servant, he became a passenger in a carriage of the defendants, drawn by a steam engine under the guidance of the defendants; that the defendants were possessed of another steam-engine, which then was drawing other carriages, under the guidance of the defendants, by their servants; yet the defendants conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed.—Plea, that the collision took place solely through the carelessness, negligence, &c. of the servants of the defendants; and that the engines and carriages were under the guidance of the servants of the defendants, who were fit and competent persons to have the guidance of the same; and that the negligence was unauthorised by the defendants, and without their leave, licence, or knowledge:—*Held*, first, that no ground of action appeared on the face of the declaration; secondly, that the plea did not amount to the general issue.

CASE by the plaintiff, the administratrix of J. Hutchinson, to recover compensation under 9 & 10 Vict. c. 93.—

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The declaration stated, that, before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of Joseph Hutchinson, the said J. H. was in the employ and service of the defendants; and while in such service and employ, the said J. H., at the request of the defendants, and in the discharge of his duty as their servant, became and was a passenger in a certain railway carriage of the defendants, in and upon a certain railway of which the defendants were then possessed, to go in and by the said railway carriage from a certain place, to wit, Viego Bank Foot, to a certain other place, to wit, South Shields, which said railway carriage then was drawn in and upon the said railway by a certain locomotive steam-engine; and the said steam-engine and railway carriage then were under the guidance, government, and direction of the defendants, by certain then servants of the defendants. That, before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of the said J. H., the defendants were possessed of a certain other locomotive steam-engine, which was then drawing ten other railway carriages in and upon the said railway; and the said last-mentioned locomotive steam-engine and railway carriages then were under the guidance, government, and direction of the defendants, by certain then servants of the defendants; yet the defendants, well knowing the premises, heretofore and in the lifetime of the said J. H., and after the passing of a certain Act of Parliament, made &c., 9 & 10 Vict. c. 93, behaved and conducted themselves in so negligent, careless, unskilful, and improper a manner, in and about the guidance, government, and direction of the said first-mentioned locomotive steam-engine and railway carriage in which the said J. H. was such passenger as aforesaid, and also in and about the guidance, government, and direction of the said other locomotive steam-engine, and of the said other railway carriages hereinbefore mentioned, that, by and through the

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carelessness, negligence, unskilfulness, and default of the defendants and their servants in that behalf, and for want of due care and attention, the said last-mentioned locomotive steam-engine, so drawing the said last-mentioned railway carriages as aforesaid, was violently driven upon and against and came into collision with the said railway carriage in which the said J. H. was such passenger as aforesaid; by means whereof the said J. H. then was greatly cut, crushed, and wounded, and of the said cuts, crushes, and wounds died, leaving him surviving the plaintiff, who before and at the time of his death was his wife, and R. H., E. H., &c., who before and at the time of his death were his children, to the damage of the plaintiff as such administratrix, &c.; and thereupon the plaintiff, as such administratrix, and for the benefit of herself and of the said children of the said J. H., according to the provisions of the said statute, brings her suit, &c.

Plea, that the locomotive steam-engine in the declaration secondly mentioned was driven upon and against and came in collision with the said railway carriage in which the said J. H. was such passenger as in the declaration mentioned, in manner and form as in the declaration is alleged, solely by and through the carelessness, negligence, unskilfulness, and default of the said servants of the defendants in the declaration in that behalf mentioned, and for want of due care and attention by them, and not by or through any other negligence, unskilfulness, default, or want of due care and attention; and that the said engines and carriages in the declaration in that behalf mentioned were respectively under the guidance, government, and direction of the said several servants of the defendants in the declaration mentioned, and of no other person or persons; and that the said several servants were then severally fit and competent persons to have the guidance, government, and direction of such engines and carriages as aforesaid respectively, as he the said J. H. well knew. And

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that the said carelessness, negligence, unskilfulness, and default, and want of due care and attention of the said servants of the defendants in the declaration in that behalf mentioned, at the said time when &c., and always, were wholly unauthorised by the defendants, and were entirely without the leave or licence, knowledge, sanction, or consent of the defendants.—Verification.

Special demurrer:—that the plea is an argumentative denial of the cause of action, does not confess and avoid the cause of action, and amounts to the general issue.—Joinder therein.

Hugh Hill, in support of the demurrer.—The first question is, is the declaration good? and it is submitted that it is. The case of *Priestley* v. *Fowler* (*a*) will be relied upon on the other side; but that case was decided on the principle, that, where common prudence and caution will guard a man, the law will not protect him in his negligence: Per Lord *Kenyon*, C. J., *Pasley* v. *Freeman*, 2 Smith's Lead. Cas. 69. [*Parke*, B., referred to *Wigmore* v. *Jay* (*b*).] Possibly, where the damage is necessarily incident to the employment, the servant cannot maintain an action against his master for an injury arising out of that employment; but why should a servant be without remedy where a stranger may recover? Here, no care or foresight of the deceased would have protected him, he was guilty of no personal negligence. Suppose a servant is sent on an errand, and, while crossing the road, his master's carriage is driven over him through the negligence of the coachman, is he to be without remedy because he serves the same master? Or suppose a railway clerk is injured, while crossing the line in the performance of his duties as clerk. [*Alderson*, B.—There may be some difficulty where the injury arises from mere negligence unconnected with the party injured, but does that point arise?] Here the deceased

(*a*) 3 M. & W. 1.

(*b*) 5 Exch. 354; a short notice of this case will be found, post, p. 589.

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was a passenger in another train. The negligence of the defendants is admitted by the plea; and it is immaterial that there was also negligence on the part of the drivers of the train in which the deceased was: *Bridge* v. *The Grand Junction Railway Company* (*a*), *Davies* v. *Mann* (*b*), *Thorogood* v. *Bryan* (*c*).

Secondly, the plea is bad. It confesses but does not avoid the cause of action.

J. Addison contrà.—The declaration is bad in substance. A passenger may maintain an action against a Company for an accident caused by the negligence of their servants, because the Company have contracted with him for his safe conveyance; but that principle does not apply where the accident occurs to a servant, because, by entering into the service, he virtually undertakes all ordinary risks incident to his employment: *Priestley* v. *Fowler* (*d*) and *Wigmore* v. *Jay* (*e*). There is no duty or contract either expressed or implied on the part of the master. Suppose a sailor were injured by the negligence of a fellow sailor in the performance of his duty, could it be argued that the owner of the vessel would be liable? And so, if two grooms were riding together, and the one by his negligence injured the other. Possibly the Company might be responsible for gross negligence; but that is not alleged in this case.

Secondly, the plea is good.

Hugh Hill, in reply.

Cur. adv. vult.

ALDERSON, B., now delivered the judgment of the Court. —This was an action under Lord Campbell's Act, brought by the plaintiff as administratrix of her deceased husband Joseph Hutchinson, to recover compensation from the defendants, on the ground that he had met with his death by reason of the negligence of their servants. [His Lord-

(*a*) 3 M. & W. 244.
(*b*) 10 M. & W. 546.
(*c*) 8 C. B. 115.
(*d*) 3 M. & W. 1.
(*e*) 5 Exch. 354; Post, p. 589.

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ship, after stating the pleadings, proceeded:] On this record the question is, whether the defendants are liable for an injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages, in discharge of his duty as their servant, in respect of which injury they would undoubtedly have been liable, if the party injured had been a stranger travelling as a passenger for hire. We think they are not. This case appears to us to be undistinguishable in principle from that of *Priestley* v. *Fowler* (*a*). In that case the plaintiff was the servant of the defendant, and had sustained an injury by the defendant having overloaded a van, in which he the plaintiff was travelling by the direction of the defendant, in the discharge of his ordinary duties. That case was fully considered, and the Court, after a verdict for the plaintiff, arrested the judgment, on the ground that a master is not in general liable to one servant for damage resulting from the negligence of another; and some of the inconveniences, not to say absurdities, which would result from a contrary doctrine, were there pointed out. The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passer by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive; and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: "Qui facit per alium, facit per se."

So far there is no difficulty. Equally clear is it, that

(*a*) 3 M. & W. 1.

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though a stranger may treat the act of the servant as the act of his master, yet the servant himself, by whose negligence or want of skill the accident has occurred, cannot. And, therefore, he cannot defend himself against the claim of a third person; nor, if by his unskilfulness he is himself injured, can he claim damages from his master upon an allegation that his own negligence was, in point of law, the negligence of his master. The grounds for these distinctions are so obvious as to need no illustration.

The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible, when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted, that if by the unskilfulness of A. a stranger is injured, the master is responsible. Not so, if A., by his unskilfulness, hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that, by the unskilfulness of A., B. the other servant is injured while they are jointly engaged in the same service, there we think B. has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms, that, as between himself and his master, he would run this risk.

Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. Hutchin-

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son, in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants; and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which Hutchinson must be taken to have agreed to run when he entered into the defendants' service, and for the consequences of which, therefore, they are not responsible. The declaration, indeed, states the accident to have arisen from the combined neglect of their servants who were managing the carriages in which the deceased was travelling, and of others of their servants who were managing the train with which the plaintiff's carriage came into collision. And Mr. *Hill* argued, that this allegation is divisible; and that, in order to sustain the declaration, it would not be necessary to prove any negligence on the part of the train in which Hutchinson was travelling; that it would be sufficient to prove negligence on the part of the other train; and so he contended, that, even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages in which Hutchinson was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with Hutchinson servants of the defendants, were not, at the time of the accident, engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. The principle is, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. The death of Hutchinson appears on the pleadings to have happened while he was acting in the discharge of his duties to the defendants as

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his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters while engaged in their service; and whether the death resulted from the mismanagement of the one train or of the other, or of both, does not affect the principle: in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run.

It may, however, be proper with reference to this point to add, that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had, if he had not been a servant.

It was contended, that the plea in this case was bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration. But we think Mr. *Addison* successfully shewed this objection to be unfounded. Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to shew that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears to us not to be open to the objection insisted on. For these

reasons we are of opinion that the plaintiff has shewn no ground of action, and so our judgment must be for the defendants.

Judgment for the defendants (*a*).

(*a*) WIGMORE, Administratrix &c., *v.* JAY.

THIS was an action under the 9 & 10 Vict. c. 93.

The cause was tried at the Middlesex Sittings after Michaelmas Term, 1849, when it appeared that the defendant was a master builder, and in building the hall of the London University, the plaintiff's husband, who was one of the bricklayers employed by him, was killed by the scaffolding, which was erected under the superintendence of the defendant's foreman, giving way. The accident occurred through the unsoundness of a pole, which had been previously pointed out to the foreman. At the trial it was objected, that the action would not lie, on the authority of *Priestley* v. *Fowler* (3 M. & W. 1). The defendant had a verdict.

Watson now moved for a new trial, citing *Armsworth* v. *South Eastern Railway Company* (11 Jur. 758), *Hutchinson* v. *The York, Newcastle, &c. Railway Company* (ante, p. 580, 5 Exch. 343).

Cur. adv. vult.

POLLOCK, C. B., delivered the judgment of the Court.—This case involves the same principle as that disposed of by the judgment of the Court in the case of *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company*. And it is impossible to distinguish this case from the doctrine laid down in *Priestley* v. *Fowler*. The husband of the plaintiff was a workman employed by the defendant to assist in the erection of a building: and the cause of the accident was the misconstruction of a scaffold, in consequence of which a part of it broke, and the husband of the plaintiff fell to the ground and was killed. The person who had erected the scaffold, or assisted in the erection of it, was not suggested to have been a person deficient in skill, or an improper person to be employed for that purpose; and the ground on which the rule was applied for was, that the case of one servant injured by the negligence of another, in the course of their common employment, was not a case in which the party or his relatives were disentitled to recover damages against the master. We are of opinion, on a very full consideration of the case of *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company*, which has been delayed for some time with a view to give the subject the fullest consideration, that no such action lies. I need not observe that, in that case, the question is on the record, and therefore may be carried to a Court of Error. The case of *Priestley* v. *Fow-*

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ler acquires additional authority from the same circumstance; for it was a case in which the Court arrested the judgment after verdict; and it does not appear that the plaintiff's counsel thought it right, even though a verdict had been obtained, to take it to a Court of Error. Under these circumstances, we think there is no occasion to grant a rule in this case.

Rule refused.

May 28th.

DIGGLE *v.* THE LONDON AND BLACKWALL RAILWAY COMPANY.

By an Act of Parliament incorporating a Railway Company, the directors were authorised to use the common seal, and all contracts in writing relating to the affairs of the Company, which should be signed by any three of the directors, were to be binding on the Company. The Company, after having been established for some time, resolved to change the system of locomotion, and, by their secretary, entered into an agreement, *not under seal*, with a contractor that he should execute the works. He accordingly commenced the works, but before they were completed he was dismissed by the Company:—*Held*, that he could not recover the value of the work done.

ASSUMPSIT for goods sold and delivered, work, labour, and materials, and on an account stated.—Plea, non assumpsit.

The cause was tried before *Pollock*, C. B., at the Middlesex Sittings after last Term, when it appeared that the defendants were incorporated by stat. 6 & 7 Will. 4, c. cxxiii. for making and maintaining a railway from London to Blackwall. By the 105th section of that statute, the directors for the time being were authorised to superintend the affairs of the Company, to use the common seal, and to do all such acts for carrying into effect the purposes of the Act as the Company was empowered to do, except such things as were required to be done at some general or special meeting of the body; no meeting was to consist of less than seven directors, and all matters in discussion were to be determined by the majority of votes. By sect. 106 the directors were empowered to appoint committees to act for them; and by sect. 107 "all contracts and agreements in writing relating to the affairs of the Company, which shall be signed by any three of the directors of the said Company, shall be binding on the said Company and all other parties thereto, their respective successors, heirs, executors, and administrators; and actions and suits may

be maintained thereon, and damages and costs recovered by or against the said Company, or any of the other parties thereto, failing in the execution thereof."

The line was originally worked by means of stationary engines at each terminus. But in the year 1848, the Company resolved to substitute locomotive engines; and accordingly the following advertisement, signed by the secretary of the Company, was inserted in the newspapers:—

"London and Blackwall Railway Company.

"The Directors are prepared to receive tenders for relaying the permanent way, and altering the gauge of this line. A section of the line, and a specification of the work required, may be seen at the office of the Company's engineer, No. 11, Adam-street, Adelphi. Tenders inclosed in sealed covers, and marked 'Tenders for Permanent Way,' are to be delivered at the offices of the Company, London Terminus, Fenchurch-street, before 12 o'clock on Monday, the 21st instant. The Directors do not pledge themselves to accept the lowest tender."

The specification was as follows:—"The contract consists in taking up the old sleepers, rails, chairs, sheaves, and sheave-frames, and removing them and all other old materials required by the Company's engineer to be so removed, to one of the termini to be hereafter decided on by the engineer; in the maintenance of all the works for two months after their entire completion to the satisfaction of the engineer; in loosening the whole of the ballast, and removing those portions that may be considered unfit for use, and providing additional ballast to alter the gradients to the level shewn on the section; in relaying the entire double line from the terminus at Fenchurch-street to the terminus at Blackwall, and all sidings connected therewith; also the laying fourteen switches and fourteen single crossings, together with the rails, chairs, &c., to

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form through connection; providing all tools required in completing the work, the keys, and trenails, and also the carriage of materials to whatever point they may be required. The Company undertaking to provide the rails, chairs, sleepers, points, and crossings, and to deliver them to the contractor at Blackwall, &c."

On the 19th of August, the plaintiff by letter, addressed to the Chairman and Directors of the Company, offered to do the work for 1436*l.* 15*s.*, which the Company by the letter of their Secretary accepted; and the plaintiff accordingly commenced the work. Before the completion of the work he was directed by the Company to discontinue it, which he did. The action was brought to recover 1778*l.* 18*s.* for the work done and materials provided. On the part of the defendants, it was objected, that the action was not maintainable, the defendants being a corporation, and the contract not being under seal. The plaintiff had a verdict, leave being reserved to the defendants to move to enter a nonsuit.

The *Attorney-General* (Sir *J. Jervis*) having obtained a rule accordingly—

Sir *F. Thesiger*, *Knowles*, and *Atherton* now shewed cause (*a*).—It is not necessary that the contract should have been under seal. Formerly, the law which required the common seal to be affixed to contracts entered into with corporations, was very strict; but in modern times that strictness has been relaxed, to meet the exigencies of a more advanced state of society. The rule is laid down in Com. Dig. tit. "Francises," F. 13, that "a corporation aggregate can do nothing but by deed under the common seal." "But a corporation which has a head, may give a

(*a*) Before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

personal command, and do small acts without deed: as it may retain a servant, a cook, butler, &c." And in *The Mayor of Ludlow* v. *Charlton* (*a*), *Rolfe*, B., says, "In modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held, that they would imply in those who are, according to the provisions of the charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench in *Beverley* v. *Lincoln Gas Light and Coke Company* (*b*)." This case falls within the exceptions of the general rule, the contract being *executed;* and the subject matter of the contract being within the scope and object for which the Company was formed, namely, the making and maintaining of the line of railway. In *Dunston* v. *The Imperial Gas Light and Coke Company* (*c*), Lord *Tenterden*, C. J., said, "I wish, however, to be understood as by no means deciding the question, whether third persons who may sell coal or other materials to the Company, or who may be employed by them as servants or workmen, may or may not maintain an action against them for remuneration, though the contract was not under seal." And in *Gibson* v. *East India Company* (*d*), *Tindal*, C. J., in delivering the judgment of the Court, said, "And indeed the same principle, that a corporation, established for the purpose of carrying on trade or manufacture, may differ from other corporate

(*a*) 6 M. & W. 821.
(*b*) 6 A. & E. 829.
(*c*) 3 B. & Ad. 131.
(*d*) 5 Bing. N. C. 271.

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bodies as to the power of contracting in matters relating to the purposes for which the Company was formed, seems also to have been the opinion of Lord *Tenterden*, as may be collected from his judgment in *Dunston* v. *The Imperial Gas Light Company*." In 2 Kent's Com. 289, it is said, "At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia* v. *Patterson* (*a*), that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorised agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay." The following cases were cited:—*Lamprell* v. *The Billericay Union* (*b*), *De Grave* v. *Mayor &c. of Monmouth* (*c*), *Paine* v. *Strand Union* (*d*), *Arnold* v. *Mayor of Poole* (*e*), *Marshall* v. *Corporation of Queenborough* (*f*), *Smith* v. *Hull Glass Company* (*g*), *Barber Surgeons' Company* v. *Pelson* (*h*), *London Gas Light Company* v. *Nicholls* (*i*), *Mayor &c. of Stafford* v. *Till* (*k*), *Fishmongers' Company* v. *Robertson* (*l*), *Dean &c. of Rochester* v. *Pierce* (*m*), *Sanders* v. *St. Neot's Union* (*n*).

Martin and *Phipson* contrà.—The contract not being under seal is invalid. By the 105th section of the Company's Act the directors have the power of using the common seal of the Company; and the 107th section requires written contracts to be signed by three directors; but the

(*a*) 7 Cranch, 299.
(*b*) 3 Exch. 283.
(*c*) 4 C. & P. 111.
(*d*) 8 Q. B. 326.
(*e*) 4 M. & Gr. 860.
(*f*) 1 Sim. & S. 520.
(*g*) 19 L. J. (N. S.), C. P., 123.
(*h*) 2 Lev. 252.
(*i*) 2 C. & P. 365.
(*k*) 4 Bing. 75.
(*l*) 5 M. & Gr. 131.
(*m*) 1 Camp. 466.
(*n*) 8 Q. B. 810.

plaintiff cannot rely upon that section: *Cope* v. *The Thames Haven Dock Company* (*a*). No doubt the use of the common seal may be dispensed with where the matter to be done is either trifling or of frequent occurrence, or such as the corporation is appointed to do: *Mayor of Ludlow* v. *Charlton*, *Arnold* v. *Mayor of Poole*, *Church* v. *Imperial Gas Company*, *Paine* v. *The Strand Union*, and *Lamprell* v. *The Billericay Union;* but here the subject matter of the contract does not fall within either of those principles. The alteration of the line of road from one system to another is neither a trifling matter, nor one of every day's occurrence, nor is it essential to the objects of the Company. The fact that the contract was executed makes no difference.—They cited *East London Water Works Company* v. *Bailey* (*b*), *Marzetti* v. *Williams* (*c*), and Pothier on Obligations, by Evans, 69.

POLLOCK, C. B.—This rule must be made absolute. The plaintiff's case is, that, having done work for the defendants, a corporation, the contract not being executory, but executed, and the work being something requisite to be done in the course of the defendants' proceeding as a Railway Company, he is entitled to recover for what he has done under that contract. But the answer is, that, in general, a corporation cannot contract except by their common seal; and, though there are excepted cases, this is not one of them, for the work done was neither a matter of necessity, nor of that sort of convenience which requires immediate action. Here the work was considerable, and the time for its performance was also considerable. The evidence shews that the parties never intended to deal as on an implied contract, such as a corporation may, under certain circumstances, enter into without their seal. They

(*a*) Ante, p. 83; 3 Exch. 841. (*b*) 4 Bing. 283. (*c*) 1 B. & Ad. 415.

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intended to contract by writing, and to enter into a solemn and express contract; and the offer of the plaintiff to do the work was accepted on the faith that there would be such a contract. It is however said, that, under the Act incorporating this Company, the defendants were competent to contract by their directors without writing, merely by a resolution communicated to the plaintiff authorising him to set about the work; and I am not quite prepared to say that might not be the case; for there is a material distinction between the clauses of this statute and those in *Cope* v. *The Thames Haven Dock Company;* but assuming that the directors here could so contract by resolution communicated to the plaintiff without writing (about which, being a matter of some doubt, I am not prepared to give an opinion); assuming also, as to which there can be no doubt, that they could contract by writing under the hands of three of them, and that they could contract under the seal of the Company, the foundation of my judgment is, that there is no contract under seal, none signed by three directors, and none entered into under such a resolution of the directors. There is nothing but the simple contract arising out of circumstances as they are supposed to have existed. On looking at all the cases, I think that none of them would justify us in extending the exceptions to this case. No doubt, a corporation is not bound on all occasions to contract by seal: for purposes of convenience, amounting to necessity, or in cases where instant assistance is required, so that there may not be time to comply with the form of putting a seal, it may be dispensed with. But the present is not a contract which necessity or immediate convenience renders indispensable, and therefore does not fall within any of the exceptions pointed out.

ALDERSON, B.—The question relates to the liability of corporations for work done for them. The general rule,

no doubt, is that they must contract under their corporate seal, that being the only way by which the governing body of a corporation can properly express the mind of the corporation. To this general rule there are exceptions; all of which, perhaps, may be classed under one of two heads:—First, when the acts done are such as the corporation by its very constitution is appointed to do, as in the case of trading corporations, whose duty, by their very appointment, being to draw bills of exchange, they may do so without affixing their common seal. Secondly, when the acts are required for convenience, management, and comfort; as in the cases which have been cited from Com. Dig. "Franchises," F. 13; where the acts are either trivial in their nature and of frequent occurrence, so that the doing of them in the usual way would be inconvenient or absurd; or such that an overruling necessity requires them to be done at once; in such cases the corporation may proceed by parol, instead of affixing the seal according to the proper and regular course. All these, however, are cases of necessity, and are exceptions to the general rule. But this is not one of those cases.

ROLFE, B.—No doubt this is a case of great importance, both as to the amount in dispute and the principle which it involves. We have to contrast a great number of authorities, both ancient and modern, and we may appear to be acting somewhat hastily in thus giving our judgment at once, without taking further time for deliberation. But this matter has been very recently under our consideration; and I have listened in vain for anything to distinguish the present case from those in which the Court has already delivered a well-considered opinion. It is unnecessary to discuss the cases in the Queen's Bench, as they are by no means at variance with that opinion. Whether in all these cases I should have come to the same conclusion—that the

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acts there done were acts of necessity—it is immaterial to consider, as in all of them the Court proceeded on the ground already stated, and adopted the general rule, that those were cases of urgent necessity within the exception, which is a rule as much as the rule itself, and has been established by several authorities, namely, that corporations cannot be sued on simple contract, unless the act be one of necessity. I say necessity, for that really embraces all the excepted cases. With these exceptions, the old law remains as it did in the time of Henry VIII. and in earlier times. The work done here is done neither on a great necessity, nor is it a matter of frequent occurrence, nor is it one of a trivial nature. It is one solitary act, to be done for a large sum of money; and there is no good reason why the corporation should not have been called together for the purpose of solemnly confirming the contract by affixing their common seal.

PLATT, B.—The defendants are, by Act of Parliament, constituted a corporate body, established for a particular object. As a corporation, they are subject to certain capacities and incapacities—one of such incapacities is, that they are unable to contract except under their corporate seal; but, by the terms of their Act, they are empowered to enter into contracts properly executed by a certain number of directors. This is the only power, with reference to the present matter, which the Act of Parliament gives them. But it is contended that this case falls within the exception to the general rule, upon which general rule the rest of the Court have rested their judgments. I must own that for some time I was struck by the argument; but when it comes to be duly considered, it is difficult to see what limit could be put to it: the argument being, that this Company was established for the very purpose of making and maintaining the railway, and conse-

quently, as the work was done for the very purpose for which this corporation was created, the case falls within one of the classes of exceptions which dispenses with the necessity of affixing the corporate seal to the contract. But the dispensing with the seal was not necessary to the contract, nor would the ceremony of affixing it have prevented the work from being done; where such ceremony, if required, would defeat the objects of the corporation, there, by implication, the corporation is empowered to contract by parol. Such was the case in *Beverley* v. *Lincoln Gas Light and Coke Company*, where the seal of the Company, if required to be affixed to the particular contract there sued upon, might have been required every twenty-four hours, and it might be impossible to obtain a meeting of the directors for that purpose. If the seal had been required there, the very objects for which the Company was established might have been wholly defeated. The plaintiff, however, has failed to shew that this case falls within any of the exceptions to the general rule.

Rule absolute.

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June 5th.

BURKINSHAW *v.* THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY.

The words "lands which shall have been *taken* for or injuriously affected by the execution of the works," in the 68th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18), include such lands only as are actually taken or actually affected by the works.

The owner of houses, which were liable to be taken for making a Railway under an Act of Parliament, received notice under the 18th sect. of the 8 Vict. c. 18, from the promoters, that they would be required for the Railway, and the Company demanded the particulars of his interest therein, and stated their willingness to purchase. The particulars were furnished by the landowner, and 4500*l.* was claimed as compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the Company to summon a jury to assess the amount. The Company took no further step in the matter:—*Held*, that the landowner could not maintain an action to recover the 4500*l.*

DEBT.—The declaration stated, that, before the commencement of this suit, and before the giving of the notice next hereinafter mentioned, to wit, on &c., under and by virtue of the provisions of a certain Act of Parliament (9 & 10 Vict. Aug. 3), the defendants were incorporated, and were thereby authorised and empowered to make and maintain a railway therein described and specified, and to execute the works necessary for the same, and to take such of the lands therein mentioned as should be necessary for the purposes of the said Acts and the works thereby authorised; and that, before the commencement of this suit, and before and at the time of the giving of the said notice hereinafter mentioned, the plaintiff was seised of certain lands in Birmingham, described in the books of reference deposited with the clerk of the peace for the county of Warwick, being the plans and books mentioned and referred to in the above-mentioned Act, and the said lands being lands which the said Company were authorised and empowered, by virtue of the Acts of Parliament, to take for the purposes of making and maintaining the said Railway, that is to say, The Birmingham and Oxford Junction Railway. And that the plaintiff being so seised as aforesaid, the defendants required to take the said lands of the plaintiff, for the purpose of making and maintaining the said Railway. And the defendants thereupon, after the passing of the said Acts, caused a certain notice in writing to be served upon the plaintiff, whereby notice was given by the defendants to the plaintiff, that the said Railway would pass

through the said lands of the plaintiff, and that the defendants required to purchase and take the same for the purposes of the said Railway, and that the defendants were willing to treat for the purchase thereof and of all estate and interest therein, and as to the compensation to be made to all parties for the damage that might be sustained by reason of the execution of the works of the said Railway. And that the defendants, by their said notice, demanded from the plaintiff the particulars of his estate and interest in the said lands, and of the claims made by him in respect thereof; and that the said notice did state the particulars of the said lands so required; and that the defendants did, at the said time of serving the said notice, take the said lands of the plaintiff for the execution of the works of the said Railway; and the plaintiff thereby, then being so seised as aforesaid, became and was entitled to a large sum, exceeding 50*l.*, to wit, the sum of 4500*l.*, as compensation from the defendants in respect of the said lands and of his interest therein; and that the plaintiff and the defendants did not, within twenty-one days after the service of the said notice by the said defendants, or at any time, agree as to the amount of compensation to be paid by the defendants for the said interest of the plaintiff in the said lands, or for any damage that might be sustained by him by reason of the execution of the works, or as to the amount of any other compensation; and that afterwards, on the 17th of July, 1849, after the expiration of the said space of twenty-one days, the plaintiff being so entitled to such compensation, and the compensation to which he was so entitled exceeding the sum of 50*l.*, and the defendants not having made, and no one having made satisfaction of or for the said compensation, or the said taking of the said lands, and the said compensation, being the compensation for the said taking, still remaining wholly unpaid, the plaintiff, then being seised as aforesaid, claimed such compensation to an amount exceeding

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50*l.*, to wit, 4500*l.*; and the plaintiff then was desirous to have the question of the said compensation so claimed by the plaintiff as aforesaid settled by a jury, and then gave to the defendants a notice in writing (according to the provisions of the statute in such case made and provided, to wit, the Lands Clauses Consolidation Act, (1845), that he was desirous to have the question of the compensation to which he was so entitled as aforesaid, in respect of his said estate and interest, and in respect of any damage that might be sustained by him by reason of the execution of the said railway works, settled by a jury; and the said last-mentioned notice also stated the nature of the interest in the said premises, in respect of which the plaintiff claimed such compensation as aforesaid, and the amount of compensation so claimed, to wit, 4500*l.* That although twenty-one days after the giving of the said last-mentioned notice elapsed long before the commencement of this suit, yet the defendants did not, within the said period of twenty-one days, nor at any time before the commencement of this suit, pay to the plaintiff the amount of the said compensation so claimed by him as aforesaid, nor enter into any written agreement for that purpose; nor did nor would the defendants, within the said period of twenty-one days after the receipt of the said last-mentioned notice, nor at any time before the commencement of this suit, issue their warrant to the sheriff to summon a jury for settling the question of the compensation so claimed by the plaintiff as aforesaid, in the manner provided by the said last-mentioned statute, or in any other manner, but on the contrary wholly neglected and refused so to do, and until and at the commencement of this suit still neglected and refused so to do, contrary to the form and provisions of the said last-mentioned statute; whereby and by force of the said statute, the defendants became liable to pay to the plaintiff the said sum of 4500*l.* in the said last-mentioned notice specified, being the amount of

compensation so claimed by the plaintiff as aforesaid; and thereby, and by force of the said last-mentioned statute, an action hath accrued to the plaintiff, to demand from the defendants the said sum of 4500*l.* above demanded. Breach, non-payment.

The defendants pleaded, that they did not, at the time of serving the said notice in the said declaration first mentioned, or at any other time, take the said lands of the said plaintiff in the declaration mentioned, or any part thereof, modo et formâ. Issue thereon.

The cause was tried, before *Pollock*, C. B., at the Middlesex Sittings after last Hilary Term, when it appeared that the action was brought to recover the sum of 4500*l.* against the Company, as the value of three dwelling-houses and premises situated in Birmingham, of which the plaintiff was the owner. The Company desiring to take these premises for the purposes of their Railway, on the 9th of January, 1847, served the plaintiff with the following notice:—

" Birmingham and Oxford Junction Railway.

" In pursuance of the Birmingham and Oxford Junction Railway Act, 1846, and the several Acts of Parliament incorporated therewith, I do hereby, on behalf of the Birmingham and Oxford Junction Railway Company, give you notice, that the said Railway will pass through messuages or tenements, workshops, outbuildings, yards, and entry, situated in the parish of Birmingham, in the county of Warwick, and numbered 140, 141, 142, and 143, on the plan and in the book of reference deposited in the office of the clerk of the peace for the county of Warwick, and which premises belong or are reputed to belong to you or some one of you, or in which you or some one of you have or claim to have some estate or interest. And I further give you notice, that the Birmingham and Oxford Junction Railway Company require to purchase and take the

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said premises for the purposes of the said Railway; and that the premises so required to be purchased and taken are coloured red upon the plan hereunto annexed; and that the said Company are willing to treat for the purchase thereof, and of all subsisting leases, term, estates, and interests therein, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the said works. And the said Company do hereby demand from you and each of you the particulars of your estate and interest in the premises so required to be purchased and taken, and of the claims made by you in respect thereof, such particulars to be delivered at the office of the secretary of the said Company, No. 34, Bennett's Hill, Birmingham, not later than twenty-one days from the service of this notice. And the said Company do hereby demand and require of you to produce to the said secretary, at his office aforesaid, within twenty-one days from the service of this notice, any lease or grant for a longer period than one year, under or in respect of which you have or claim to have any estate or interest in the premises so required to be purchased and taken.

"Dated this 7th day of January, 1847.

"JOHN WILLIAM KIRSHAW,

"Secretary to the said Company."

"To Mr. Richard Bates, Mrs. Bates, Mr. Charles Burkinshaw, and to all and every other person and persons whom it may concern.

"Mr. Hornblower, of Birmingham, is the agent appointed by the Birmingham and Oxford Junction Railway Company to treat for the purchase of the property to which this notice relates."

The plaintiff, upon the receipt of this notice, delivered to the defendants particulars, stating the amount he claimed as the value of the houses to be 4500*l.*; and he

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required the payment of that sum, or that the defendants should issue a warrant to summon a jury to assess the amount under the Act. No further steps were taken by the Company.

Under these circumstances it was contended at the trial, on the part of the defendants, that the plaintiff's land had not been taken, within the meaning of the 68th section (*a*) of the Lands Clauses Consolidation Act (8 Vict. c. 18). However, a verdict was entered for the plaintiff for the amount claimed, leave being reserved to the de-

(*a*) Sect. 68 enacts, that, "if any party shall be entitled to any compensation in respect of any lands, or any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l*., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of the compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of such notice from any party so entitled, the same shall be settled by arbitration, in manner herein provided or if the party so entitled as aforesaid, desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts."

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fendants to move to set that verdict aside, and to enter a verdict for them.

Whateley having obtained a rule nisi accordingly,

Martin, *Aspland*, and *T. Y. Lee*, now shewed cause.—The defendants having taken the plaintiff's land are liable in this action, under the 68th section of the 8 Vict. c. 18. The effect of the notice was to entitle the defendants to the land, and to prevent the plaintiff from disposing of it; and they are liable for the amount demanded, the defendants by their silence admitting the amount to be correct: *Rex* v. *The Hungerford Market Company*(a). In *Salmon* v. *Randall*(b), Lord *Cottenham* said, "The parties, I conceive, are put into the situation of vendor and purchaser by the notice; and, like every other vendor and purchaser, they must of course complete their purchase according to the provisions, not of the contract, but of those arrangements which the Act of Parliament has substituted in lieu of the contract in a case where no contract can take place." The notice constitutes a taking within the meaning of the 68th section. The statute does not speak of a notice to take; and the 84th section uses the word "enter," which is an argument against that construction, by which it will be contended that the taking must be by entry or some equivalent act. So, in *Stamps* v. *Birmingham and Stour Valley Railway Company*(c), Lord *Cottenham* says, "I have decided, and decided generally in all cases where the question has arisen, that, where a Company gives notice to purchase, and where they have described the quantity of land that they require, by that means they enter into a contract with the landowner to make the purchase, and that, therefore, they cannot afterwards depart from it; they cannot say, I have agreed with

(a) 4 B. & Ad. 327.
(b) 3 My. & Cr. 449.
(c) Ante, p. 123; 17 L.J., Chanc., 431.

you to purchase two acres of your land, but I now find that we do not require it, and I give you notice that I mean only to purchase one acre." They cited *Eaton* v. *Midland Great Western Railway Company* (*a*), *Walker* v. *Eastern Counties Railway Company* (*b*), *Regina* v. *The Commissioners of Woods and Forests* (*c*), *Corrigal* v. *London and Blackwall Railway Company* (*d*), *Ramsden* v. *Manchester and South Junction Railway Company* (*e*), *Doe* d. *Hutchinson* v. *Manchester, Bury, and Rossendale Railway Company* (*f*), and *Rex* v. *Nottingham Old Water Works Company* (*g*).

Whateley and *F. Robinson* contrà.—The mere fact of the defendants having given notice that they intended to take the plaintiff's land is not equivalent to a taking within the 68th section. The 68th section requires that there should be an *actual* taking, or some other act by which the land is injuriously affected. It is admitted, that by the notice the defendants are bound to take the land, and in equity they may possibly be held to have taken it, but not at law.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a motion to enter a verdict for the defendants; and the question raised at the trial is a very important one. The plaintiff is the proprietor of three houses, which were included in the property liable to be taken by the defendants under their Act for making a Railway. In pursuance of the powers contained in the Act 8 Vict. c. 18, s. 18, notice was, on the 9th day of January,

(*a*) 10 Ir. L. Rep. 310.
(*b*) Ante, Vol. 5, p. 469.
(*c*) 17 L. J., Q. B., 341.
(*d*) Ante, Vol. 3, p. 411; 5 M. & Gr. 219.
(*e*) Ante, Vol. 5, p. 552; 1 Exch. 723.
(*f*) 14 M. & W. 687.
(*g*) 6 A. & E. 355.

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1847, given by the promoters of the undertaking to the plaintiff, that his property would be required by them for it; and by the notice they demanded of him the particulars of his interest therein, and stated their willingness to treat with him for the purchase of the same. These particulars were duly furnished, and a value, 4500*l.*, put on the property by the plaintiff, which amount he claimed from the promoters, as a compensation for taking these premises. He required payment of this amount, or that a warrant should be issued by the Company to summon a jury to assess the proper amount under the provisions of the Act. The Company neglected for twenty-one days and upwards to do either; and the question is, whether the plaintiff, upon these facts, can maintain an action, and recover as damages the amount of 4500*l.* so claimed by him. And this depends upon the construction to be put by the Court on the 68th section of the 8 Vict. c. 18.

By that section, when lands shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters shall not have made any compensation, a party claiming a compensation exceeding 50*l.* may have it settled by arbitration, or by a jury; and if he selects, as he has done here, a jury, the promoters are bound to summon one in twenty-one days, and in default thereof are made liable to pay the party so entitled the amount of the compensation so claimed, and the same may be recovered by action, with costs, in any of the superior Courts.

Now, the question here is, what is the meaning of the words "lands taken for the execution of the works;" for it is to such lands alone that the clause applies. It has been determined on several occasions by Lord *Cottenham*, and, independently of his high authority, we entirely concur in that opinion, that where a Company, as here, give notice to a party that they require his lands for their works, it amounts to an agreement by them for the purchase of those lands, assented to by the opposite party, on the terms of

making the compensation in the way appointed by the Act under which such notice is given, and binds both parties finally. In some sense, therefore, lands, upon such notice being given, may be described as lands taken for the execution of the works. And so, in one case, the Court of Queen's Bench called them, and we think correctly. But the point is, whether the "lands taken" in the 68th section mean lands actually taken into the possession of the Company, and those alone. And, after carefully considering the various clauses of the Act preceding the 68th section, we have arrived at the conclusion, that this is the correct construction. The whole of this part of the Act, beginning at the 16th section and ending at the 68th inclusive, seems to us to form, so to speak, one code on this subject, and to provide successively for all the various cases that were likely to occur. It is preceded by this preamble: "And, with respect to the taking and purchase of lands otherwise than by agreement, be it enacted:" then follow the 16th and 17th sections, providing when those powers may be put in force. And then follows the 18th, as to giving notice of the lands required, and the compulsory treating for the same in case the notice does not lead to an agreement without further dispute. The disputed claims, if any under 50*l.*, are settled under the 22nd and 24th sections, by the determination of two justices, in all cases. If the compensation exceeds 50*l.*, then, by the 23rd section, an option is given to the party claiming to have an arbitration; and if this be adopted it is to be carried into effect by the sections beginning at the 25th and ending at the 37th inclusive. Then begin the clauses as to the settlement of disputes by the verdict of a jury, where the party claiming appears; those end with the 57th section. The 58th to the 67th then follow, as to the assessment of the value of the land comprised in the notice in the case of owners who are absent. This is to be done by a surveyor duly appointed, with a limited power of subsequent arbitration or

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assessment by a jury, if required by the absent party. Now, these provisions really exhaust the whole of the cases in which the Company give notice of requiring the lands of the owners adversely, when the Company requiring them are not in possession of the lands, and can only obtain that possession upon payment of the ascertained compensation. But another class might exist, and require to be provided for, in which the above provisions could not be applied; and that was the class where the Company had been permitted to take possession, without any distinct agreement for compensation, or where, in the execution of their works, injury not originally in the contemplation either of the Company or of the owners, was actually incurred. And the literal meaning of the words, land which shall have been taken, or shall have been injuriously affected—not land which *shall be* taken or *shall be* injuriously affected,—clearly, we think, points to this class alone. Independently, therefore, of the argument, not an unimportant one, that the construction contended for by Mr. *Martin* would not give full effect to both the 23rd and 68th sections, but make them in some degree inconsistent, we have come to the conclusion, that, upon the true construction of the 68th section, the words "lands taken, &c." include lands only actually taken or actually affected by the Company, and consequently that, these lands not having been so taken, this action cannot be sustained against the defendants.

The result is, therefore, that the rule must be made absolute.

Rule absolute.

Hilary Term, 1851.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY *v.* BURNSIDE. *Jan.* 11*th*.

DEBT for calls.—The declaration stated, that the defendant is the holder of twenty shares in the South Staffordshire Railway Company, and is indebted to the said Company in 118*l*., for calls; whereby an action hath accrued to the plaintiffs, to demand from the defendant the said sum above demanded, by virtue of the Companies Clauses Consolidation Act, 1845, and of the South Staffordshire Junction Railway Act, 1846, and of the South Staffordshire Railway Act, 1847.

Pleas—First, never indebted; secondly, that the defendant is not the holder of the said shares; thirdly, that, before the commencement of the suit, the defendant became a bankrupt, and that the said supposed causes of action accrued to the plaintiffs before the defendant so became a bankrupt.

The cause was tried before *Rolfe*, B., at the Liverpool Spring Assizes, 1850; when it appeared that the action was brought to recover the amount of five calls upon twenty shares of 20*l*. each, amounting to 118*l*.; of which shares the defendant was the registered shareholder. The first call, of 1*l*. 8*s*. per share, was made on the 9th of September, 1847, payable on the 1st of November following; the second, of 1*l*. 10*s*. per share, was made on the 18th of February, 1848, payable on the 31st of March; the third, of 1*l*. per share, was made on the 14th of August, 1848, payable on the 14th of

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September; the fourth, of 1*l.* per share, was made on the 29th of November, 1848, payable on the 12th of January following; the fifth, of 1*l.* per share, was made on the 9th of April, 1849, payable on the 12th of July. On the 8th of February, 1848, a fiat in bankruptcy issued against the defendant, and on the same day the official assignee was appointed; on the 26th of February, the trade assignee was appointed; and on the 24th of April following, the defendant obtained his certificate. The defendant having become bankrupt, he inserted in his schedule the shares, and the amount of subscriptions unpaid; and the scrip certificates were handed over to the assignees, who have ever since continued to hold them. The Company having applied to the defendant for the calls, he gave them notice of his bankruptcy and certificate. Some correspondence took place between the trade assignee and the official assignee, in the course of which the former sent to the latter a statement of the bankrupt's property, in which these shares were entered:—"Railway Shares, probably 20*l.*;" and in which statement was the following estimate:—"Balance to work bankruptcy and pay dividend, 86*l.* 17*s.* 6*d.*" On the 6th of June, 1848, the trade assignee wrote to the official assignee as follows:—"In the balance sheet I see a few railway shares—are they sold? if not, had not we best turn them into money, and endeavour to wind up this miserable affair." On the 6th of July, 1848, the trade assignee again wrote to the official assignee as follows:—"Some few railway shares, which I think he valued at 70*l.*, will belong to the estate—are they sold?—probably they will prove valueless." On behalf of the defendant it was insisted, that the shares had passed to the assignees; that the calls were proveable under the bankruptcy, and were therefore barred by the certificate. The learned Judge left it to the jury to say whether the facts amounted to an acceptance of the shares by the assignees; who found that

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they did not. The plaintiffs had a verdict, leave being reserved to the defendant to move to enter the verdict for him.

A rule nisi having been obtained accordingly,

Crompton now shewed cause (*a*).—First, the defendant continued the holder of the shares notwithstanding his bankruptcy. *Sayles* v. *Blane* (*b*) shews, that until the deed of transfer has been registered, the transferror continues liable; and in *The Midland Great Western Railway Company* v. *Gordon* (*c*), *Parke*, B., says, "All that the purchaser took by the sale to him of the scrip certificates for shares, was an equitable right to have his name entered on the register as a shareholder. If he so registers his name, then he is the shareholder, and the liability of the original shareholder ceases; but, till he does so, it continues." The same remarks are applicable to the case of bankruptcy; and so long as the bankrupt's name continues on the register, he remains liable. The 14th section of 8 Vict. c. 16, requires the transfer to be by deed. The 15th section enacts, that if the interest in any share shall be transmitted in consequence of bankruptcy, such transmission shall be authenticated by a declaration in writing, and "until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof." Here there has been no such authentication: *Copeland* v. *Stevens* (*d*). At all events, the bankrupt remains liable, unless the assignees interfere by accepting the shares, which they have never done: *Boorman* v. *Nash* (*e*), *Herbert* v. *Sayer* (*f*), and *Turner* v. *Richardson* (*g*). Secondly, the

(*a*) Before *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(*b*) Ante, p. 79; 19 L. J., Q. B., 19.

(*c*) Ante, Vol. 5, p. 76; *S. C.*, 16 M. & W. 804.

(*d*) 1 B. & Ald. 593.

(*e*) 9 B. & C. 145.

(*f*) 5 Q. B. 965.

(*g*) 7 East, 335.

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calls were not debts proveable under the fiat: *Toppin* v. *Field* (*a*), and *Lane* v. *Burghart* (*b*).

Martin and *Addison* in support of the rule.—This is a debt payable on a contingency, within the 56th section of the 6 Geo. 4, c. 16. The liability of the shareholder is, to pay a certain fixed amount if called upon. The obligation is debitum in præsenti solvendum in futuro; and the effect of the certificate in bankruptcy is not to extinguish the debt, but merely to bar the remedy: *Newton* v. *Scott* (*c*). Though, under the 18th section, the transmission of shares by bankruptcy must be authenticated, there is nothing to prevent the property in the shares from passing to the assignees, though they may not have the rights of shareholders until authentication under the Companies Clauses Consolidation Act. Secondly, there is evidence of assent. The assignees have taken possession of the scrip, which are the indicia of the property. Besides, the letters from the trade to the official assignee shew that they treated them as available property. [*Parke*, B.—The 18th section of the 8 Vict. c. 16, has provided a mode by which the assignees might have become the holders of these shares, and this they have not complied with. So that there are two equivocal acts, and the absence of a third, which would have been unequivocal, and would certainly have authenticated the transmission, if the assignees intended to take the shares.] Lastly, this is a debt proveable under the commission: *In re Willis* (*d*), *Willis* v. *Murray* (*e*), *Atwood* v. *Partridge* (*f*).

PARKE, B.—With respect to the question, whether the assignees have accepted these shares—I think that they

(*a*) 4 Q. B. 386.
(*b*) 3 M. & Gr. 597.
(*c*) 10 M. & W. 471.
(*d*) 4 Exch. 530.
(*e*) In the Exchequer, not reported.
(*f*) 4 Bing. 209.

have not. The other point we will take time to consider.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Cur. adv. vult.

Jan. 11*th.*

The judgment of the Court was now delivered by

PARKE, B.—This was an action brought by a Railway Company for calls. The pleas were, first, never indebted; secondly, that the defendant was not holder of the shares; and, thirdly, his bankruptcy.

The defendant was the holder of twenty shares of 20*l.* each. There were four calls made; after the first the defendant became bankrupt, and a fiat issued on the 8th of February, 1848. On the 24th of April, 1848, the defendant obtained his certificate; assignees were appointed, and a correspondence took place between the official assignee and the trade assignee, in the course of which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares upon which the calls were made, and resulting in an estimate of the probable amount that would be forthcoming to work the fiat and pay dividends, and he subsequently wrote, suggesting the propriety of selling the shares. Three calls were made subsequently to the fiat.

On the trial, before *Rolfe*, B., a verdict passed for the plaintiffs, and liberty was given to move to enter it for the defendant.

As to the first call there is no question—the plaintiffs are not entitled to recover. As to the others, it was contended for the defendant, first, that there was evidence that the assignees had taken to the shares, and consequently that the shares had vested in them by the assignment, before the three last calls were made; and if so, the bankrupt would be no longer holder, and therefore not

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liable. We intimated our opinion during the argument, that there was no sufficient evidence to warrant the jury in coming to that conclusion; and of that opinion we remain.

The property of the shares, therefore, continuing in the bankrupt, the next question is, whether the Company are barred by his certificate, on the ground that this was a debt proveable under the fiat as a debt due in futuro, under the 51st section, or on a contingency, within the meaning of the 56th section of the 6 Geo. 4, c. 16. That it was not a debt in præsenti payable in futuro, we consider to be quite clear.

The statute which enables the Company to recover calls, no doubt merely enforces an obligation on the shareholders, created by contract. If the defendant contracted with the Company to take twenty shares, upon each of which the capital to be contributed was 20*l.*, he may be said to have agreed with them to pay 20*l.* per share by such instalments as, according to the statute, they were entitled to require. If he purchased the shares from another, he may be considered as having taken upon himself the contract of the vendor to the like effect. But under this section (the 51st), which is taken from the 7 Geo. 1, c. 31, s. 1, a debt under such a contract could not be proved. It was uncertain how much of the 20*l.* per share the exigencies of the Company would call for, nor could it be told what the time of payment would be, and consequently what the amount to be rebated. The clause of the stat. 7 Geo. 1 applies only to certain debts owing at the time of the bankruptcy, payable at a *certain* time: Lord *Eldon*, in *Ex parte Barker* (*a*), in effect overruling *Ex parte Mitford* (*b*). It is clear, therefore, that this debt could not have been proved under the 51st section.

Is this, then, a debt payable on a contingency, under the

(*a*) 9 Ves. 114. (*b*) 1 Bro. C. C. 398.

56th section? The contract on which the shareholder's obligation is founded, is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the Company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted.

But, in order to bring a case within the 56th section, the bankrupt must have contracted a certain *debt* before the bankruptcy, payable after it on a contingency. The clause was meant to meet cases which were considered as operating very harshly, and which the 51st section did not comprise, such as sums payable under marriage settlements by a bankrupt, after his death, or on survivorship: see *Ex parte Marshall* (*a*).

If it were also necessary that the contingency should be such as to be capable of valuation (as was held by Lord *Lyndhurst*, see *Ex parte Marshall* (*b*)), this is a contingency which never could be the subject of valuation, depending not merely on the wants of the Company, but the ownership of the shares at the time of the call by the bankrupt; for if he had parted with the shares, he would be no longer responsible. However, it does not seem to be necessary that it should be capable of valuation: *Ex parte Marshall* (*c*), *In re Willis* (*d*); therefore, we do not decide that the case does not fall within the 56th section on that ground; but on the other ground, of the uncertainty of the claim, we are of opinion that it does not. The situation of the bankrupt in this respect bears a close resemblance to that of a lessee who has become bankrupt, who continues liable after his certificate to the payment of rent accruing due subsequently to the bankruptcy. The contract

(*a*) 1 Mont. & A. 128.
(*b*) Id. 124.
(*c*) 1 Mont. & A. 156.
(*d*) 4 Exch. 530.

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to pay rent in futuro is not a debt contracted at the time of the bankruptcy, and could not be proved under the fiat against him.

We may add, that, to make the bankrupt's estate pay a dividend on the full amount of the sum subscribed for, when no other shareholders were yet required, nor sure to be required, to pay a call, would put him in a much worse situation than others, and would be obviously unjust.

We think the rule must be discharged.

Rule discharged.

1850. *Nov.* 19*th* & 20*th*.

1851. *Jan.* 11*th*.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* M'MICHAEL.

Under the Companies Clauses Consolidation Act an infant shareholder is not absolutely bound, but he is in the same situation as an infant acquiring real estate or any other permanent interest; he is not deprived of the right which the law gives every infant of waiving and disagreeing to a purchase which he has made; and, if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due.

DEBT for calls.—The first count stated, that the defendant is the holder of ten shares in the Company, and is indebted to the plaintiffs in 112*l.* 10*s.*, in respect of six calls on each of the said shares, to wit, a certain call of 1*l.* 10*s.* on each of the said shares, &c.; whereby an action hath accrued to the plaintiffs by virtue of the Companies Clauses Consolidation Act, 1845, and the North Western Railway Act, 1846, to demand from the defendant the said sum, &c.

The second count was for interest, and money due on an account stated.

Second plea, to the first count.—That, before the making

Debt for calls.—Plea, that the Company, in pursuance of the defendant's application, granted the shares to him as the original holder thereof, and entered his name in the register as the proprietor, and so the defendant became the original holder of the shares by contract; that, when the shares were granted to him, and his name entered as aforesaid, and at the respective times of making the calls, the defendant was an infant; that he has never ratified or confirmed the said application, grant, entry, and proprietorship, but the same have remained wholly unratified and unconfirmed; that he has not at any time derived any profit, benefit, or advantage whatsoever from the shares or by reason of his being the proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant:—*Held*, on general demurrer, bad, for not averring that the defendant had attained his majority, disclaimed, and given back the shares, or that he had not attained his majority.

of any of the calls, the defendant applied to the Company to become the holder of ten shares; and the Company, in pursuance of the defendant's application, granted the shares in the declaration mentioned to him, as the original and first holder thereof, and then entered his name in the register of shareholders in the Company as the proprietor of the said shares; and so the defendant then became and still is the original and first holder of the shares in the declaration mentioned, by contract with the Company, in manner aforesaid, and not otherwise; and the proprietorship of the said shares, acquired as in this plea aforesaid, is the same proprietorship of the said shares in the declaration mentioned. That, when the defendant applied as aforesaid, and when the shares in the declaration mentioned were granted to him and his name was entered as aforesaid, and also at the respective times of the making of the calls in the first count mentioned, the defendant was an infant within the age of twenty-one years. That the defendant has never ratified or confirmed the said application, grant, entry, and proprietorship, or any or either of them, but the same have, and each and every of them hath hitherto always remained wholly unratified and unconfirmed. That the defendant has not at any time derived any profit, benefit, or advantage whatsoever from the said shares or by reason of his being proprietor thereof; and such proprietorship has always been wholly uprofitable and useless to the defendant.

The third plea, to the second count, was similar.

General demurrer and joinder.

Willes, in support of the demurrer (*a*).—The pleas afford no defence. The fact of the defendant being an infant when the shares were allotted, and when the calls were made, affords no answer to the action without a renunci-

(*a*) Before *Pollock*, C. B., *Alderson*, B., and *Platt*, B.

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ation. If this were simply an action on contract the plea might be good; but if it is to be assimilated to the case of a purchase by an infant of an estate in respect of which rent is to be paid, it is not; and the latter is the true principle. An infant may purchase: Co. Litt. 2. b.; and the 8 Vict. c. 16, s. 79, contemplates infants being shareholders. These shares have incidents analogous to chattels real; and if an infant takes a lease, he is bound to pay the rent unless he renounce. In *Ketsey's case* (*a*) the sole question was, whether a lease made to an infant was void. "And it was objected, that it should be void, because it might be prejudicial to him, who had not sufficient discretion for the managing of the land, and the rent may be greater than the value of the land. But the Court held it to be voidable only at his election; for if it were for his benefit, it shall be no ways void; but the infant, at his election, may make it void by refusing and waiving the land before the rent-day comes; for then no action of debt will lie against him. But, in the principal case, it was not shewn that the rent was of greater value, and the defendant was of full age before the rent-day came; therefore it was adjudged for the plaintiff." *Kirton* v. *Eliott* (*b*), *The Leeds and Thirsk Railway Company* v. *Fearnley* (*c*), *Williams* v. *Moor* (*d*), *Holmes* v. *Blogg* (*e*). In *The Cork and Bandon Railway Company* v. *Casenove* (*f*), the Court of Queen's Bench considered that there was a statutory liability which bound the infant. And in *The Newry and Enniskillen Railway Company* v. *Coombe* (*g*), the plea stated that the defendant, at the time the calls were made, was an infant; and that, before action, he disaffirmed and repudiated the contract; bringing the case within *Ketsey's case*,

(*a*) Cro. Jac. 320.
(*b*) 2 Bulst. 69.
(*c*) Ante, Vol. 4, p. 644; 4 Exch. 26.
(*d*) 11 M. & W. 256.
(*e*) 2 Moore, 552.
(*f*) 10 Q. B. 935.
(*g*) Ante, Vol. 5, p. 633; 3 Exch. 565.

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Kirton v. *Eliott*, and *Stowel* v. *Lord Zouch* (*a*). The allegation, that the defendant "has never ratified or confirmed the application," is not equivalent to a repudiation.

Cleasby contrà.—The plea shews that the defendant became a shareholder by contract, and a repudiation is unnecessary. The decisions as to the holding of land, which is founded on occupation, are inapplicable; here no interest in land passes: *Humble* v. *Mitchell* (*b*). [*Alderson*, B.—This Court has held that the property of these Companies is money, which, in order to make it profitable, is intrusted to the corporation, who have an unlimited power of converting part of it into land and part into goods, and of changing and disposing of each from time to time, for the purpose of obtaining a surplus profit for the individual contributors: *Bligh* v. *Brent* (*c*).] In *The Cork and Bandon Railway Company* v. *Cazenove*, the continued possession or non-repudiation of the shares was considered equivalent to a ratification. Here, however, is an express averment that the defendant has never ratified: Bac. Abr. "Infancy and Age," (I) 7; *Gibbs* v. *Merrill* (*d*). In *Williams* v. *Moor* (*e*), *Parke*, B., says, "The contract of an infant for goods sold and delivered (not being necessaries) is as completely void as his contract on an account stated, if by the word void is meant incapable of being enforced." [*Parke*, B.—In *Maddon* v. *White* (*f*), *Buller*, J., said, that "Lord *Mansfield*, in the case of *Earl of Buckingham* v. *Drury* (*g*), laid it down as a general principle, that, if an agreement be for the benefit of an infant at the time, it shall bind him: Lord *Hardwicke* afterwards adopted this rule."] The following cases were cited: *Baylis* v. *Dineley* (*h*), *Town-*

(*a*) Plowd. 353.
(*b*) Ante, Vol. 2, p. 70; 11 A. & E. 205.
(*c*) 2 Y. & C. 268.
(*d*) 3 Taunt. 307.
(*e*) 11 M. & W. 256.
(*f*) 2 T. R. 159.
(*g*) 3 Bro. P. C. 492; Wilmot's Notes, 194.
(*h*) 3 M. & Sel. 477.

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son v. *Tickell* (*a*); Bac. Abr. "Infancy," (I) 8; Roll. Abr. "Enfant," (K).

Willes, in reply.

Cur. adv. vult (*b*).

(*a*) 3 B. & Ald. 31.

(*b*) See next case, infra.

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Where there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, the plea is insufficient. Therefore, the plea in this case, *ante*, p. 564, was holden bad in arrest of judgment.

SEE the pleadings in this case, ante, p. 564.

Welsby having obtained a rule for judgment non obstante veredicto, on the ground that the plea was bad,

Willes now (Dec. 3, 1850) appeared to shew cause, and *Welsby* to support the rule.

Cur. adv. vult.

PARKE, B., now (*a*) delivered the judgment of the Court.—The question to be decided in the case of *The North Western Railway Company* v. *M'Michael* is, whether the second plea (the third to the second count being identical) contains a good primâ facie answer to the declaration. If the effect of a person actually becoming a shareholder in a Railway Company, by original agreement with the Company, ought to be treated as a mere contract with those to whom the proposal was made for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertaking in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts except for necessaries are, not binding on the infant at all; and the simple fact, that the de-

(*a*) January 11th, 1851.

fendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants, having become shareholders in Railway Companies, have been held liable to pay calls made whilst they were infants: *The Cork and Bandon Railway Company* v. *Cazenove* (*a*), *The Leeds and Thirsk Railway Company* v. *Fearnley* (*b*). They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers, who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance to pay rent, 21 Hen. 6, 31 b, in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted: *Evelyn* v. *Chichester* (*c*); unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so: Bac. Abr. "Infancy and Age," (I) 5; Co. Litt. 380. This Court accordingly held, in *The Newry and Enniskillen Railway Company* v. *Coombe* (*d*), that an infant who did avoid the contract of purchase during minority, was not liable to pay any calls. In the subsequent case of *The Leeds and Thirsk Railway Company* v. *Fearnley* (*b*), where

(*a*) 10 Q. B. 935.
(*b*) Ante, Vol. 4, p. 644; 4 Exch. 26.
(*c*) 3 Burr. 1717.
(*d*) Ante, Vol. 5, p. 633; 3 Exch. 565.

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there had been no waiver or repudiation of the purchase, we held, in conformity with the decision of the Queen's Bench, that the defendant continued liable. We cannot say that we concur in the opinion of that Court, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that all shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the Company for calls, and also attaches the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favour of infants and lunatics in statutes containing general words, (*Stowell* v. *Lord Zouch* (*a*)), though that depends, of course, on the intent of the legislature in each case, (see Wilmot's Notes of Opinions and Judgments, p. 194, *The Earl of Buckingham* v. *Drury*), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. (See Bac. Abr. "Infancy and Age," (I) 8.) The law is clearly laid down in Co. Litt. 2. b.: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and, at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the pur-

(*a*) Plowd. 364.

chase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a Railway Company or other chartered corporation is not thereby made a holder of real estate: *Bligh* v. *Brent* (*a*); for all real estates are vested in the corporate body, not in the individuals composing it; but the shareholder acquires, on being registered, a vested interest of a permanent character in all the profits arising from the land and other effects of the Company, and, when registered, may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground we think the plea in the case of *The Birkenhead Railway Company* v. *Pilcher*, which we have to consider with this, bad, notwithstanding the verdict, and therefore we are of opinion that the rule should be absolute to enter up judgment for the plaintiffs in that case, notwithstanding the verdict entered for the defendant.

But the case of *The North Western Railway Company* v. *M'Michael* contains, besides the averment of infancy at the time of the contracts for the shares, other special facts —not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase. This case is one of more difficulty.

The law upon this subject is to be found as early as 21 Hen. 6, 31 b, where it was held by *Newton*, J., that, if

(*a*) 2 Y. & C. 268.

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an infant lessee takes possession, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownlow, 120, as *Ketley's case;* in Cro. Jac. 320, as *Kelsey's case;* in 2 Bulst. 69, as *Kirton* v. *Eliott;* and in Roll. Abr. 731, as *Kettle* v. *Eliot.* The case is most fully reported in Brownlow. It was an action of debt for rent; the defendant pleaded his infancy at the time of the lease made, in bar; and it was argued, on demurrer to the plea, that the defendant should be charged, because by the lease made he is become a purchaser, and so to be, in judgment of law, as a man of full age.

We collect that the principle upon which the Court decided was, that, every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bac. Abr. "Infancy," (I) 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord *Ellenborough*, in *Baylis* v. *Dineley* (*a*), intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not; and that, if he continues a possessor after age, he adopts it: and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and revests it in the party from whom the infant purchased; if made within age, it suspends it only, because such disagreement may be again recalled, when the infant attains his majority.

(*a*) 3 M. & Selw. 481.

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But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one, is an answer, the estate still being vested in the infant. We are disposed to think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though the defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the case of *Ketley*, as reported in Bulstrode, *Haughton*, J., expressing an opinion, that if the lease was for an acre at 100*l.* per annum, and the infant occupy and enjoy it, he is to be charged with the rent, he being here taken to be a purchaser; but *Dodderidge* said, that if a greater rent was reserved than the land was worth, that then, peradventure, the infant should not be charged. This opinion is more strongly expressed in the report in Brownlow. This is certainly a point of some nicety; but the question may be asked, why, in such a case, does not the infant disagree to and avoid the purchase, and so get rid of the obligation? and is it reasonable, that he should retain the estate and prevent the owner from having any use of it, and not be liable to the burthen, though disproportionate? It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the meantime, he ought to be at liberty, or his guardian for him, to get rid of the liability, by shewing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his majority, for then, clearly, he ought to disclaim it, and thereby give back the estate; and to make such a plea good, where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The plea, as it stands, is by no means free from doubt. We think, however, the more reasonable

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view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed, —at all events, unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the Company from having it, and dealing with it as their own, without being liable to bear the burden attached to it. For these reasons we think the plea is bad, and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

COURT OF QUEEN'S BENCH.

Trinity Term, 1850.

June 6th.

REGINA *v.* THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY.

MANDAMUS.—The writ recited that, after the making of the 9 & 10 Vict. c. cccxxxvii. and c. cccxxxviii. and within three years from the passing of the said last-mentioned Act, on the 21st of January, 1847, the defendants, in pursuance of the said Act, and of the Acts incorporated therewith, gave notice in writing to W. H. Osborne, that they required to purchase for the purpose of their Railway a cer-

The 8 Vict. c. 18, s. 123, enacts, "that the powers of the promoters of the undertaking for the compulsory purchase or taking of land, for the purposes of the special Act, shall not be exercised after the expiration of the prescribed period," &c.:—*Held*, that this limitation did not apply against a landowner, who, having within the prescribed period received a notice that his land was required by the promoters, and having within that period regularly served them with a notice that he required the amount of compensation to be determined by a jury, and, wishing to complete the sale of his land, applies for a mandamus to compel the Company to issue a warrant for summoning a jury; that, in such case, the powers that the landowner wished to be exercised, were not "powers of the promoters of the undertaking for the compulsory purchase or taking of land" within the above section.

tain part of a messuage, and were willing to treat for the purchase thereof, and as to the compensation to be made to the said W. H. Osborne for the damages which might be sustained by him; that the said W. H. Osborne was seised in fee of the said messuage, and that the compensation claimed by him exceeded 50*l.*; that W. H. Osborne gave notice to the defendants of the particulars of his estate and interest in the said messuage, and that he was willing to sell and convey the same to the defendants for 12,000*l.*, and that he claimed besides 3000*l.* for damages; and that, if the defendants declined to pay the said sums, he required the amount of compensation to be determined by a jury. That the defendants had not agreed with W. H. Osborne; and that he had required the defendants to issue their warrant to the sheriff of Warwickshire to summon a jury; which they refused to do. The writ then commanded the defendants to issue a warrant to the said sheriff to summon a jury for the purpose of assessing the compensation to be paid to the said W. H. Osborne, for his interest in the said messuage.

Return.—That, by the 9 & 10 Vict. c. cccxxxvii. it was amongst other things enacted, that the powers of the said Company for the compulsory purchase of lands for the purposes of the said Act should not be exercised after the expiration of three years from the passing of that Act; and that, before the application for the said writ of mandamus, to wit, on the 3rd of August, 1849, three years had expired from the passing of the said Act; and that the defendants had not at the time of the issuing of the said writ or since, any power to issue a warrant to the sheriff, commanding him to summon a jury, in pursuance of and according to the provisions of the Lands Clauses Consolidation Act, 1845, for the purposes in the said writ suggested.

Plea.—That after the passing of the 11 & 12 Vict. c. 3, the defendants applied to the Commissioners of Railways for an extension of the time for the compulsory purchase

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of lands; and that the said Commissioners did afterwards, pursuant to the provisions of the said Act, extend the period allowed by the said Act, in the return mentioned, for the compulsory purchase of lands for the purpose of constructing the said Railway, for the further period of two years.

Replication.—That before the passing of the 11 & 12 Vict. c. 3, to wit, on &c., and not at any later or subsequent time, a notice was given by the defendants to the said W. H. Osborne for purchasing and taking the lands and premises of him the said W. H. Osborne, in the said writ and plea mentioned.

Demurrer and joinder.

June 5th.

Peacock for the prosecutor (*a*).—If a Railway Company give notice to landowners to purchase land within the time limited by their Act for exercising their compulsory powers, they are bound to issue their warrant for assessing the amount of compensation even after that period, the notice creating a contract to purchase between the landowner and the Company: *Rex* v. *Hungerford Market Company* (*b*); and the issuing the warrant after that period under such circumstances would be authorised by 8 Vict. c. 18, s. 123. [Lord *Campbell*.—Perhaps the Company would admit that, if the mandamus had been moved for before the expiration of the three years, it might have issued.] They have exercised their option and can be compelled to proceed: *Doo* v. *London and Croydon Railway Company* (*c*), *Salmon* v. *Randall* (*d*). Besides, the 4th section of 11 & 12 Vict. c. 3, enacts, that the special Act is to be construed as if the extended period were the period limited by it; and

(*a*) Before Lord *Campbell*, C. J., *Patteson*, J., *Coleridge*, J., and *Erle*, J.

(*b*) 4 B. & Ad. 327.

(*c*) Ante, Vol. 1, p. 257; S. C., 8 L. J., Chanc., 200.

(*d*) 3 My. & Cr. 439.

the 5th section provides that, where notice has been given to purchase before the recent Act passed, it should not have the effect of extending the time as to such lands; the reason of this being, that no extended time in that case was necessary. Section 124 of 8 Vict. c. 18, also shews, that, in such a case as this, proceedings are not limited by the prescribed period. The proceedings to complete the purchase must all relate to the time of giving the notice.

Whateley contrà.—No doubt the notice creates a contract, which the Company may be compelled to complete, provided that power exists for doing so; but as the proceedings to assess compensation form part of the compulsory powers of the Act, the landowner is bound to set the machinery in motion before the expiration of those powers: 8 Vict. c. 18, s. 123. The writ in this case did not issue until after those powers had ceased; and, therefore, the Company could not obey it by issuing a warrant, which they have now no authority to do: *Brocklebank* v. *The Whitehaven Junction Railway Company* (a). The prosecutor cannot lie by until the prescribed period has expired, and then apply for a mandamus. The landowner's remedy is in equity.

Peacock, in reply, cited *Walker* v. *Eastern Counties Railway Company* (b), *Regina* v. *Deptford Pier Company* (c).

Lord CAMPBELL, C. J.—We are of opinion that the prosecutor is entitled to our judgment; but we are desirous to have it understood that we give no opinion upon the points argued at the bar beyond what is necessary for the decision of this particular case. Here, the special Railway Act having received the royal assent on the 3rd of August,

(a) Ante, Vol. 5, p. 373; *S. C.*, 16 L. J., Chanc., 471.
(b) Ante, Vol. 5, p. 469; *S. C.*, 6 Hare, 594.
(c) 8 A. & E. 910.

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1846, the three years from the passing of it expired on the 3rd of August, 1849. On the 21st of January, 1847, the Company gave the prosecutor notice that they required to purchase a part of his house and premises; and no further steps were taken by either party till the 3rd of May, 1849, when the prosecutor gave notice to the Company of the amount of his claim for the part of his house and premises which the Company required, and for damage which the severance would cause, and demanded that the amount of the compensation to which he was entitled should be determined by a jury. The Company neglected and refused to issue their warrant for summoning a jury. In Michaelmas Term, 1849, after the expiration of the three years, the prosecutor applied to this Court, and the present mandamus was granted for the summoning of a jury. The defendants rely upon the 123rd section of the 8 Vict. c. 18, and a similar clause in their special Act, whereby it is enacted, "that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special Act, shall not be exercised after the expiration of the prescribed period, and, if no period be prescribed, not after the expiration of three years from the passing of the Special Act."

We think that this limitation does not apply against the landowner, who, having within the three years received a notice that his land is required by the promoters of the undertaking, and having within the three years regularly served them with a notice that he requires the amount of compensation to which he is entitled, to be determined by a jury, and, wishing to complete the sale of his land, applies for a mandamus to compel the Company to issue a warrant for summoning a jury. We do not think that the powers which he wishes to be exercised, are "powers of the promoters of the undertaking for the compulsory purchase or taking of lands." The powers to be thus exercised are powers to enable a willing vendor to transfer the full right

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and title of his lands to the Company, on ascertaining and receiving the compensation to which he is entitled. In this view of the case, it is not necessary to consider what effect is to be given to the supposed legislative construction by the 11 & 12 Vict. c. 3, of the 123rd section of 8 Vict. c. 18, in respect to the powers of compulsory purchase belonging to the promoters of the undertaking. The case of *Brocklebank* v. *The Whitehaven Junction Railway Company*, as decided by the Vice-Chancellor of *England*, was strongly pressed upon us by the counsel for the defendants; but that decision seems to have been much doubted by Lord Chancellor *Cottenham* when brought before him on appeal; and, in as far as it may apply to a case like the present, where the proceeding for completing the purchase originates with the landowner, we think it is not an authority to be acted upon. We therefore give judgment against the defendants, and award a peremptory mandamus.

A WRIT OF ERROR on this judgment having been sued out in the Exchequer Chamber,

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Whateley now (*a*) appeared in support of the writ of error, and urged the same arguments as in the Court below, relying upon *Brocklebank* v. *The Whitehaven Junction Railway Company* (*b*).

Mellor contrà.

PARKE, B., delivered the judgment of the Court.—We are of opinion, that the judgment of the Court below, delivered by the Lord Chief Justice, is perfectly correct; and that the 123rd section of the Lands Clauses Consolidation

(*a*) Before *Parke*, B., *Alderson*, B., *Maule*, J., *Cresswell*, J., *Platt*, B., *V. Williams*, J., and *Talfourd*, J.

(*b*) Ante, Vol. 5, p. 373; *S. C.*, 16 L. J., Chanc., 471.

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Act, which restricts the Company from exercising their powers for the compulsory taking of land beyond the prescribed period, is only binding on the Company. The notice to treat is an inchoate purchase; and after that has been given in due time, it is competent for the landowner to compel the completion of that purchase. The Company are in this case bound to pay for the land, and the landowner is bound to convey it to them. The case of *Brocklebank* v. *The Whitehaven Junction Railway Company* appears not to have been concurred in by the Lord Chancellor.

Judgment affirmed.

Easter Term, 1851.

April 30th.
May 7th.

REGINA *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

The writ of mandamus supposes the required act to be possible; and if it be shewn that the party have not the power to do the act commanded, the writ is bad: —*Held*, therefore, that a Railway Company could not be compelled by mandamus to purchase land to make a branch Railway, where the compulsory powers of the Company to purchase the necessary land had expired before the writ issued, though the Company had, a month before the expiration of the powers, been required by the landowners so to do.

Whether the want of funds to complete the line would have been a good answer to the writ—*Quære* (*a*).

MANDAMUS to the London and North Western Railway Company, tested the 22nd of April, 1850, commanding them to purchase the lands necessary for making, constructing, executing, and completing the Birstoll Branch Railway and extension thereof, and to make, construct, execute, and complete the same, in pursuance of the provisions, powers, and authorities contained in the Leeds, Dewsbury, and Manchester Railway Act, 1845, 1846 (8 & 9 Vict. c. xxxvi. and 9 & 10 Vict. c. cclxii.); and the Act incorporating the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Man-

(*a*) See *Reg.* v. *Lancashire and Yorkshire Railway Company*, 20 L. J., Q. B., 507.

chester Railway Company, with the London and North Western Railway Company (10 & 11 Vict. c. clix.), and as they had been required to do by an application duly made to them on the 18th of June, 1849.

Return:—That the said Leeds, Dewsbury, and Manchester Railway Company were not at any time from the passing of the Leeds, Dewsbury, and Manchester Railway Act, 1845, or from the time of the passing of the Leeds, Dewsbury, and Manchester Deviation and Branches Railway Act, 1846, until the time of the passing of the Act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and North Western Railway Company, nor were the said London and North Western Railway Company at any time since the passing of the said last-mentioned Act of Parliament, nor were they at the time of the coming of the writ to them, nor are they now, nor have either of the said Companies at any time hitherto been by law liable or bound, under or by any of the said several Acts of Parliament in the annexed writ mentioned or referred to, or any or either of them, to make or maintain the branch Railway in the said writ mentioned, commencing &c. That by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, in the said writ mentioned (sect. 4), after reciting that the estimated expense of making the said Railway in the said Act mentioned was 640,000*l.*, it is enacted that the capital of the said Company should be 650,000*l.* Provided, nevertheless, that if, under the provisions thereinafter contained, the said Company should not execute so much of the Railway thereby authorised, as lay between the town of Huddersfield and the junction thereof with the Manchester and Leeds Railway, then the capital of the said Company should be only 500,000*l.* That by the same Act, (sect. 44), after reciting that a bill was then pending before Parliament, intituled "An Act for making a Railway from the

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Sheffield, Ashton-under-Lyne, and Manchester Railway, at Stalybridge, to the Manchester and Leeds Railway at Kirkheaton, with a Branch therefrom, and for consolidating into one Undertaking the said proposed Railway and the Huddersfield Canal Navigation;" and that the line of the Railway and one of the branches thereof thereby respectively authorised to be made, and the line of the intended Railway of the Company proposed to be incorporated by the last-recited bill, under the name of the "Huddersfield and Manchester Railway and Canal Company," follow the same course between the town of Huddersfield and the Manchester and Leeds Railway, being a distance of about four miles; and that it was expedient that provision should be made, and that an arrangement should be effected, under the authority of Parliament, between the said two Companies with respect to the construction of the said portion of Railway and the said branch; and that it had accordingly been agreed between the said two Companies, that the Company, by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, incorporated, should suspend the making of so much of their proposed Railway and branch as lay between Huddersfield aforesaid and the said Manchester and Leeds Railway; and that the said last-mentioned portion of the said Railway and the said branch should be made by the said Huddersfield and Manchester Railway and Canal Company; it is enacted, that none of the powers and authorities by that Act given to or vested in the said Company by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, incorporated, should be or should be capable of being put into force or executed by the said Company thereby incorporated, in respect of the making of that portion of the said Railway, and the branch which lay between Huddersfield aforesaid and the Manchester and Leeds Railway, for the space of eighteen months after the passing of that Act; and that if the said Huddersfield and Manchester Railway and Canal Company

should, before the expiration of the said eighteen months, have commenced and proceeded bonâ fide in the execution of that part of the said Railway and branch, then, and in such case, all and every the powers and authorities vested in the said Company by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, incorporated, so far as respected the making of that portion of the said Railway and branch, and also all liabilities of the said last-mentioned Company in respect of such portion and branch, should absolutely cease and be at an end. That by the said Act, ("The Leeds, Dewsbury, and Manchester Deviations and Branches Railway Act, 1846," sect. 2,) after reciting that the estimated expense of the works by that Act authorised was 100,000*l.*, it is enacted, that it should be lawful for the said Company to raise the sum of 100,000*l.* by the creation of new shares, as they should think fit, in addition to the sum of money they were authorised to raise by their former Act, or might be authorised to raise by an Act to be passed during the then present session of Parliament. That by the said Act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and North Western Railway Company, in the annexed writ mentioned, it is, amongst other things, enacted (sect. 32), that it should be lawful for the London and North Western Railway Company, after the commencement of that Act, and subject to the provisions therein contained, to exercise all the powers, with reference to the raising of money, either by the creation of new shares, or by mortgage, which might have been granted to the Huddersfield and Manchester Railway and Canal Company, or the Leeds, Dewsbury, and Manchester Railway Company respectively by the said Acts, recited in the said last-mentioned Act relating to such Companies respectively, and which might be then in force, and also all powers which might have been or be granted to the

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said respective Companies respectively by an Act or Acts of the then present or the then next session of Parliament, and for such purposes to create additional shares in the London and North Western Railway Company, or to mortgage or assign the undertaking, and the rates, tolls, or other property of the London and North Western Railway Company, as the case might be, but so, nevertheless, that the total amount of money to be raised by the London and North Western Railway Company, under the powers of that Act and of the said Acts therein recited, and any other Act or Acts of the then present session, should not exceed the aggregate amount of capital which the London and North Western Railway Company, and the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, were or might be authorised to raise under the powers of the said several recited Acts, and any other Act or Acts of the then present or the then next session relating to their respective undertakings. That no powers for the raising of money for any of the purposes aforesaid, by the creation of new shares, or by mortgage or otherwise, were granted to the said several Companies, or any of them, by any Act or Acts of the then present, or then instant, or any other session of Parliament; and that, before the expiration of eighteen months next after the passing of the Leeds, Dewsbury, and Manchester Railway Act, 1845, the said Huddersfield and Manchester Railway and Canal Company commenced and bonâ fide proceeded in the execution of that part of the said Railway and branch which lay between Huddersfield aforesaid and the Manchester and Leeds Railway; and that the said portion of the said Railway and branch was made by the said Huddersfield and Manchester Railway and Canal Company, whereby the powers and authorities by the said last-mentioned Act given to and vested in the said Leeds, Dewsbury, and Manchester Railway Company, so far as respected the

making the said portion of the said Railway and branch, and all the liabilities of the said last-mentioned Company in respect of such portion and branch, from the time of such commencement and proceeding as aforesaid, absolutely ceased and were at an end; whereby the capital of the said Leeds, Dewsbury, and Manchester Railway Company, under the said Leeds, Dewsbury, and Manchester Railway Act, 1845, became and was reduced to the sum of 500,000*l.*, and under the said Leeds, Dewsbury, and Manchester Deviations and Branches Act, 1846, to the further sum of 100,000*l.*, making together the sum of 600,000*l.* only, and no more; which was and ever since has been the full, and entire, and only capital of the said Leeds, Dewsbury, and Manchester Railway Company, which they were empowered to raise either by the said Acts or by any other Act whatsoever. That after the passing of the said Leeds, Dewsbury, and Manchester Railway Act, 1845, and after the passing of the said Leeds, Dewsbury, and Manchester Deviations and Branches Act, 1846, and before the passing of the said Act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the said London and North Western Railway Company, and before any such application was made to the said London and North Western Railway Company as in the annexed writ mentioned, and before the coming of the said annexed writ to them, the said Leeds, Dewsbury, and Manchester Railway Company had, under the powers and authorities in them vested by the said Railway Acts of 1845 and 1846, raised the whole of the said several sums of 500,000*l.* and 100,000*l.*, making together the sum of 600,000*l.*, so by them authorised to be raised as aforesaid, and had bonâ fide, and duly and necessarily, and according to and in pursuance of the several Acts of Parliament aforesaid, wholly expended the same, and every part thereof, in and about making the said Railway from Leeds by

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Dewsbury to Huddersfield aforesaid, (except that portion of the said railway and branch which was so made by the said Huddersfield and Manchester Railway and Canal Company as aforesaid), and in improving the communication by railway between the towns of Leeds and Huddersfield aforesaid and the town of Manchester, as by the said Acts of 1845 and 1846 they were authorised and empowered to do; and that the said Leeds, Dewsbury, and Manchester Railway Company had not, nor had the said London and North Western Railway Company, at the time when such application was made as aforesaid, or at the time of the coming of the annexed writ to them, nor have they or either of them now any power or authority whatsoever, by the said Acts of Paliament in the annexed writ mentioned and referred to, or any or either of them, or by any other Act of Parliament whatsoever, to raise or procure, for the purposes of making the said railway from Leeds by Dewsbury to Huddersfield, or improving the communication by railway between the said towns of Leeds and Huddersfield and the town of Manchester, or any deviations therefrom or branches thereof, or for the purchase of lands, or for executing any works whatsoever under or by virtue of the said several Acts, or any of them, any further or other sum than the said sum of 600,000*l.* so by the said Leeds, Dewsbury, and Manchester Railway Company heretofore raised and expended as aforesaid. That before any such application was made to them as in the said annexed writ is mentioned, and before the passing of the said Act for incorporating the Manchester and Huddersfield Railway Company, and the said Leeds, Dewsbury, and Manchester Railway Company with the London and North Western Railway Company, the said Leeds, Dewsbury, and Manchester Railway Company had wholly expended the said full sum of 600,000*l.* so by them authorised to be raised and expended as aforesaid in and about the making of the said railway from Leeds by Dewsbury to

Huddersfield, (except that portion of the said railway and branch which was so made by the said Huddersfield and Manchester Railway and Canal Company as aforesaid), and in improving the communication by railway between the towns of Leeds and Huddersfield aforesaid and the town of Manchester, as by the said Acts of 1845 and 1846 they were authorised and empowered to do; and, at the said time when the said application in the annexed writ was so made to them as aforesaid, they had no money or power to raise money for the purchase of lands necessary for making, constructing, executing, or completing the said Birstall Branch Railway and extension thereof, or any or either of them, or any part thereof. That after the said application in the annexed writ mentioned was made to the said London and North Western Railway Company to purchase the necessary lands for making, constructing, executing, and completing the said Birstall Branch Railway and extension thereof, and to make, construct, and complete the same, according to the provisions contained in the said Leeds, Dewsbury, and Manchester Railway Act, 1845, and the said Leeds, Dewsbury, and Manchester Deviations and Branches Act, 1846, and the said Act incorporating the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company with the London and North Western Railway Company, and before a reasonable time in that behalf had elapsed, and before the coming to the said London and North Western Railway Company of the annexed writ to them, to wit, on the 27th of July, 1849, all the powers and authorities of the said Leeds, Dewsbury, and Manchester Railway Company, and of the said London and North Western Railway Company, to purchase the necessary lands for making, constructing, executing, and completing the said Birstall Branch Railway and extension thereof, had, according to the provisions contained in

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the said Leeds, Dewsbury, and Manchester Railway Act, 1845, and the said Leeds, Dewsbury, and Manchester Deviations and Branches Railway Act, 1846, and the said Act for incorporating the Huddersfield and Manchester Railway and Canal Company, and the said Leeds, Dewsbury, and Manchester Railway Company, with the London and North Western Railway Company, wholly ceased and determined, and were entirely at an end; wherefore the said London and North Western Railway Company, before the coming of the annexed writ to them, and for the said space of time in the said writ mentioned, delayed and suspended the further works authorised to be done by the said Acts of Parliament in the annexed writ mentioned, for making, constructing, executing, and completing the said Birstoll Branch Railway and extension thereof, as it was lawful for them to do, for the causes aforesaid.

Special demurrer, that it was the duty of the Company to have purchased the necessary lands before the expiration of their powers; that they were under an obligation to complete the line, notwithstanding the return; and that it did not appear that the Company had not money sufficient to complete the Railway, or power to raise sufficient money for that purpose.

Knowles (with whom was *Watson* and *Hodges*) in support of the demurrer (*a*). First, it was the duty of the Company to have purchased the necessary lands before the expiration of their powers. Private Acts of this kind are in the nature of contracts made by the Legislature on behalf of the Company with the public, which they are bound to perform: *Blakemore* v. *Glamorganshire Canal Navigation* (*b*), *Rex* v. *Cumberworth* (*c*), *Rex* v. *Edge Lane* (*d*), *Rex* v. *Cumber-*

(*a*) Before Lord *Campbell*, C.J., *Patteson*, J., *Wightman*, J., and *Erle*, J.

(*b*) 1 M. & K. 154.
(*c*) 3 B. & Ad. 108.
(*d*) 4 A. & E. 723.

worth (*a*); and the fact of the Company not having funds to complete the line is no answer: *Reg.* v. *Eastern Counties Railway Company* (*b*), *Cohen* v. *Wilkinson* (*c*), *Carlisle* v. *South Eastern Railway Company* (*d*), *Reg.* v. *Luton* (*e*), *Reg.* v. *Commissioners of Woods and Forests* (*f*), *Reg.* v. *Clerkenwell* (*g*). Secondly, the return does not allege that there is any necessity for the exercise of the compulsory powers; but, in fact, those powers had not expired when application was made to the defendants to complete the line; which brings this case within that of *Reg.* v. *Birmingham and Oxford Junction Railway Company* (*h*). [Lord *Campbell*, C. J.—That case decided, that, as against a landowner who required the Company to go on, they could not set up the expiration of their compulsory powers. *Erle*, J.—And in that case it was very possible that the Company might be able to purchase the land.] So here. And the defendants are estopped from setting up their own wrong. At any rate the Company are bound to do their best to obey the writ, and, if necessary, they must apply to Parliament for an extension of their powers. [Lord *Campbell*, C. J., cited *Reg.* v. *Caledonian Railway Company* (*i*).]

Sir *Fitzroy Kelly* (with whom was Sir *J. Bayley*) contrà. —The Court will not issue a peremptory mandamus to the Company, directing them to do that which, without their default, they are unable to perform; besides, it is clear, that no beneficial effect can result from issuing a peremptory mandamus. No doubt, the defendants stand in the same

(*a*) 4 A. & E. 731.
(*b*) 10 A. & E. 531; ante, Vol. 1, p. 509.
(*c*) Ante, Vol. 5, p. 741; *S. C.*, 12 Beav. 125.
(*d*) 19 L. J., Chanc., 477.
(*e*) 1 Q. B., 860.
(*f*) 19 L. J., Q. B., 497.
(*g*) 15 Jur. 35.
(*h*) 19 L. J., Q. B., 453; 20 Id., 304; ante, p. 628.
(*i*) 20 L. J., Q. B., 147; post.

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position as the Leeds and Manchester Company would have stood; but their funds have already been expended, and they could not be called upon to execute the works. [Lord *Campbell*, C. J.—Since the 10 & 11 Vict. c. clix. there is an unity of exchequer, and you must shew that you have no funds whatever, in order to answer the writ.] The return does negative the power of the Company to raise, and their having, the necessary funds for the purposes required. In those cases where a mandamus has been granted against a Company to complete works, it has been actually engaged upon the work; and the Court has acted upon the principle, that, if undertaken at all, it must be completed as the Act requires. [*Patteson*, J.—If the Company begin to make the Railway, then, possibly, they will be compelled to complete it; but not, if they have never begun.] Here the Company have no funds to complete the works, and that without their default. [Lord *Campbell*, C. J.—If that were made out, no doubt it would afford a strong argument in appealing to the discretion of the Court.] On that ground it is submitted, that the Court ought not to issue a peremptory mandamus, and also on the ground that the compulsory powers of the Company have expired. He cited *Rex* v. *Round* (*a*).

Knowles, in reply, cited *Reg.* v. *Eastern Counties Railway Company* (*b*), *Rex* v. *Severn and Wye Railway Company* (*c*).

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.—In this case we are of opinion that the defendants are entitled to our judgment. The objection, that the powers of the Company for the compulsory purchase

(*a*) 4 A. & E. 139. (*b*) 10 Id. 531. (*c*) 2 B. & Ald. 646.

of lands had expired before the writ of mandamus issued or was applied for, seems to us to be clearly decisive.

We are not called upon, therefore, to decide the more doubtful questions, whether there lay upon the Company an obligation to make and complete the railway, which might have been enforced by mandamus, or whether the return sufficiently shews a want of funds for the purpose, or how far this want of funds would be an answer.

This writ of mandamus, which is tested the 22nd April, 1850, commands the Company "immediately to purchase lands necessary for making, constructing, executing, and completing the Birstall Branch Railway and extension thereof, and to make, construct, execute, and complete the same Birstall Branch Railway and extension thereof, in pursuance of the provisions, powers, and authorities contained in the recited Acts of Parliament." The special Act, 9 & 10 Vict. c. cclxii., which received the royal assent on the 27th of July, 1846, enacts, by sect. 18, "that the powers of the Company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act;" and by sect. 20, "that the works hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period the powers granted to the Company for executing the same shall cease to be exercised, except as to so much of the same respectively as shall then be completed."

The power effectually to obey the command in the writ having expired in July, 1849, ought we, in the Queen's name, to have given the command in April, 1850? On full consideration, we think not. A writ of mandamus supposes the required act to be possible, and to be obligatory when the writ issues. Generally speaking, the writ suggests facts shewing the obligation, and the possibility of fulfilling it. A return pursuing this suggestion, and

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traversing it, is good: *Rex* v. *The Commissioners of Sewers in Essex* (*a*), *Rex* v. *Round* (*b*), *Rex* v. *Williams* (*c*), *Rex* v. *Penrice* (*d*). The supposed obligation here is founded on public Acts of Parliament, which are recited in the writ and return, and of which we are bound to take judicial notice. If they shew that the Company have no longer power to do the act commanded, the writ is bad. What power have the defendants now to purchase the lands necessary for making a line of railway of several miles? A peremptory mandamus going as is prayed, no excuse can afterwards be made, and the defendants must implicitly and fully obey it, under pain of imprisonment. Supposing that they were bound to pay any prices which might be demanded, however extortionate, can it reasonably be supposed that all the landowners along the line will be willing to sell at any price, and that none of them are under disability to sell? Mr. *Knowles* contended that the return should have shewn an application to all the landowners, and a refusal by them. But such a return, and the issues arising upon it, would be highly inconvenient; and even if all had promised to sell, without binding contracts having been entered into, they might afterwards change their minds, and the defendants might be subject to perpetual imprisonment for not doing what the law forbids them to do.

It was then said, that they have violated the Acts of Parliament, by not duly completing the whole of the railway, and that they ought not to be allowed to make the objection, which amounts to taking advantage of their own wrong. But assuming that they were under the obligation contended for, and that they were liable to be punished by indictment for a breach of it, how can we say that the remedy now is to command them to do what they have

(*a*) 2 Str. 763.
(*b*) 4 Ad. & E. 139.
(*c*) 8 B. & Cr. 681.
(*d*) 2 Str. 1235.

no longer the power to do, however obediently they may be inclined? Reliance was very properly placed on the case of *Reg.* v. *The Birmingham and Gloucester Railway Company* (*a*), which at first sight seems an authority in favour of the mandamus; but, when properly examined, it will be found on this point to be entitled to little weight. The great struggle there was, whether the turnpike-road, when restored, must be as wide as it had formerly been; there the notice to do the act had been given as early as possible, and the act to be done was merely to restore the turnpike-road to its former width, which apparently required no purchase of land, either voluntary or compulsory. In the present case the prosecutors were guilty of laches, by giving no notice to do the act till the power of doing it was expiring, and not applying for the mandamus till a considerable time after the power had expired. In the former case the Company might reasonably have been expected to be able to do the act without any power of compulsory purchase, but in the present case this is a mere impossibility.

We therefore think, that, both on principle and on authority, our judgment must be for the defendants.

Judgment for defendants (*b*).

(*a*) Ante, Vol. 2, p. 694; *S. C.*, 2 Q. B. 47.

(*b*) See *Reg.* v. *The York, Newcastle, and Berwick Railway Company*, post, p. 648; and *Kinnersly* v. *The North Staffordshire Railway Company*, post, p. 662.

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June 2nd. REG. *v.* THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

On an application for a mandamus against a Railway Company, by a landowner, over whose land the line was authorised to be made, but to whom no notice had been given by the Company requiring his land, to complete the line and to purchase the necessary land for that purpose:—*Held*, that it was no answer to the rule, that the prescribed period for the compulsory purchase of the necessary land had nearly expired, if there was still a period during which the Company might take the requisite initiatory steps.

Semble, the obtaining a private Act of Parliament enabling parties to execute railway works, creates an obligation on the parties to complete them.

THIS was a rule calling upon the York, Newcastle, and Berwick Railway Company to shew cause why a writ of mandamus should not issue against them, commanding them to make and complete a railway from Thirsk to Malton, and to proceed to purchase the land necessary for making the Railway. From the affidavits upon which the rule was obtained it appeared, that the Newcastle and Darlington Junction Railway Company, by 9 & 10 Vict. c. lviii., which received the royal assent on the 18th of June, 1846, were authorised to make a Railway from Thirsk to Malton, with a branch to Helmsley. By sect. 14 the powers of the Company for the compulsory purchase of lands for the purposes of the Act, were not to be exercised after the expiration of three years from the passing of that Act, which period was by a subsequent Act extended to two years more. By 11 & 12 Vict. c. lv., passed 22nd of July, 1848, the defendants were authorised to abandon part of the Thirsk and Malton branch, and to substitute another portion of Railway over certain other lands. By that Act, the powers for the compulsory purchase of land were not to be exercised after the expiration of three years from the date of the passing of the Act, which period was by a subsequent Act extended to two years more. It further appeared, that certain influential landowners on the branch line assented to the application of the Company to Parliament for powers to make the line, and for the extension of the time, on the faith that the Company intended speedily to complete it.

Shortly after the passing of 9 & 10 Vict. c. lviii., the en-

gineer of the Company commenced to survey and stake out the ground, and several excavations had been made to ascertain the nature of the soil, but no notices had been served on the landowners, nor had any further steps been taken by the Company. In January, 1851, a meeting of the landowners took place, when it was resolved, that a mandamus should be applied for, in order to compel the Company to complete the line, if the directors declined to proceed; and a deputation of the landowners waited upon the directors, who expressed their intention not to proceed. It further appeared, that most of the landowners were willing to treat for the sale of their lands, and that the Company had ample funds to complete the line. In March 1851, notice had been served on the directors requiring them to complete the line.

The affidavits in opposition to the rule stated, that no notice had been given to the landowners by the Company that their lands would be required, nor had any steps been taken towards the purchase of the lands required. That it would require at least six months to effect the purchase of the land required for the line, which would be unremunerative to the Company if made.

Sir *F. Kelly*, *Knowles*, and *Atherton*, now shewed cause (*a*). —The compulsory powers expire as to one portion of the land required for the line on the 13th of July next, and as to the remaining portion on the 22nd of July; and as no steps have been taken by the prosecutors from June, 1848, to January, 1851, they are now precluded by their own laches from compelling the Company to proceed, particularly as the Company have given no notice to the landowners requiring their land. Further, it is impossible for the Company to take the necessary steps for the purchase of the required land before the expiration of their

(*a*) Before Lord *Campbell*, C. J., *Patteson*, J., *Coleridge*, J., and *Erle*, J.

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compulsory powers, which is an answer to this rule. [*Coleridge*, J.—The Company have power under the 85th section of 8 Vict. c. 18, to enter upon the land before any agreement is come to, on depositing in the Bank of England either the amount of the purchase-money, or such a sum as shall be determined by the surveyor to be the value, according to the mode pointed out by that section.] But before the amount can be ascertained, the compulsory powers will have expired. [*Coleridge*, J.—We have decided in *Doe* d. *Armistead* v. *The North Staffordshire Railway Company* (*a*), that the ascertaining the amount of compensation after lands have been entered upon under sect. 85 is not an exercise of the compulsory powers of a Company to purchase.] At all events, the prosecutors ought to have used reasonable diligence in applying for the writ, and not have laid by until nearly the time of the expiration of the compulsory powers. They ought to have applied in such time as to have left no doubt of the mandamus being obeyed consistently with reasonable diligence. [Lord *Campbell*, C.J.—We must assume that it is obligatory on the Company to make the line, therefore the defendants must shew that it is impossible for them to take the necessary steps within the time limited.] That is shewn in the present case. In *Reg.* v. *The London and North Western Railway Company* (*b*), the Court refused a peremptory mandamus, saying, "The writ of mandamus supposes the required Act to be possible, and to be obligatory when the writ issues." [Lord *Campbell*, C. J.—In that case the compulsory powers of the Company had actually expired before the writ issued.] The Court must look at the state of things existing at the time when the writ issues; and it is clear, that, before a return can be made, and the question on the record argued, the compulsory powers will have expired.

(*a*) 20 L. J., Q. B., 249; *S. C.*, post.
(*b*) Ante, p. 634; *S. C.*, 20 L. J., Q. B., 399.

Sir *F. Thesiger* and *T. P. Thompson* contrà.—This case is not governed by *Reg.* v. *The London and North Western Railway Company;* for here there is a period of time existing during which the compulsory powers may be exercised, if the Company be so minded, or they may proceed under section 85 of the 8 Vict. c. 18: *Doe* d. *Armistead* v. *The North Staffordshire Railway Company.* The notice to take land creates a contract between the Company and the landowner, which may be enforced in equity after the powers of the Company have expired: *Stone* v. *The Commercial Railway Company* (*a*), *Worsley* v. *The South Devon Railway Company* (*b*). The Company have the power of entering upon the land and staking out the line (8 Vict. c. 18, s. 84), which they have here done; and it is a hardship upon the landowner if he is neither to have the use of his land nor to be able to compel a purchase. The Court must look at the state of things existing at the issuing of the first writ.

Lord CAMPBELL, C. J.—This rule must be made absolute. For the present, I assume that the Company have entered into a contract to make the line in question, which is obligatory upon them, for they are not in the situation of a Company who have not exercised any of the powers conferred upon them by the legislature; and this Court will compel the Company by mandamus to perform the legal obligation that they have entered into, there being no other legal remedy. If the landowners do not apply until the powers of the Company for the compulsory purchase of lands have expired, they are guilty of laches, and we would not in that case compel the Company to do that which would be illegal: *Reg.* v. *The London and North Western Railway Company.* In *Reg.* v. *The Birmingham and Glou-*

(*a*) Ante, Vol. 1, p. 375; 4 M. & Cr. 122.
(*b*) 20 L. J., Q. B., 254; post.

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cester Railway Company (*a*), it was said, that a return by the Company, that they could not obey the writ, because that which they were commanded to do had become impossible by reason of their compulsory powers of purchasing under the special Act having expired before they were called upon to do it, was inadmissible. With the most profound respect for my predecessor, I think that the words attributed to him in that case go too far; for they would include a case where the act is impossible when the mandamus issues. It lies upon those who contest their liability to the writ to shew the impossibility of fulfilling their obligation; that was done in *Reg.* v. *The London and North Western Railway Company*, but is not shewn here. If due diligence were used, the line might be completed within the time fixed: the defendants do not allege any want of funds, or any difficulty in arranging with the landowners. As to the argument, that the time for the exercise of the compulsory powers will have expired before a peremptory mandamus can issue after a return has been made, we cannot allow it to prevail. If, instead of obeying the writ, the defendants make a bad return, they will do so at their peril. If it has become impossible to fulfil the contract at the time of the issuing of the peremptory mandamus, it will be open to the defendants to contest their liability on that ground, and to go if they like to a Court of error. The effect of the notice is, no doubt, to create a contract, whereby the Company become purchasers for a reasonable value to be thereafter assessed, as provided by the statute. We shall make this rule absolute, assuming that the Company are bound to obey the writ.

PATTESON, J.—If it were clearly shewn that the powers of the Company for the compulsory purchase of lands could not be exercised, this case would come within the autho-

(*a*) 2 Q. B. 61.

rity of *Reg.* v. *The London and North Western Railway Company.* There is still a period during which all the initiatory steps may be taken by the Company, or they may take the other steps, under section 84, if necessary. Therefore it is not shewn that the Company are disabled altogether from proceeding to complete the line, or that, by making this rule absolute, we bring ourselves within the predicament of issuing a writ ordering the Company to do that which is impossible.

COLERIDGE, J.—The question now is, simply, whether the Company have sufficient time for doing an act which we must assume, for the purposes of this rule, they ought to have done. It may turn out that this Court has no power to compel them to complete the line. If so, the Company will not be prejudiced by our making this rule absolute, as no peremptory mandamus will issue. But if, on the return, we find that we have the power, and that the Company are bound to complete the line, they will receive no benefit from the delay occasioned by making a return, because they will have been proved to be in the wrong. In considering whether the Company will have reasonable time for purchasing the lands necessary for making their line, the time must be calculated from the present moment, and must be taken strictly against the Company, because, on the passing of their Act, they ought to have taken steps bonâ fide for the purchase of the lands. And, in considering whether the landowners have been guilty of negligence in making this application, time ought to be taken favourably as regards them, for they may not know within what period they must apply for a mandamus against the Company; and I think that they have not been guilty of any negligence. The whole period down to 1849 is accounted for; as, when the Company obtained power to extend their line, the landowners had a right to presume that they intended bonâ fide to com-

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plete it in 1849; and in 1851 the landowners take the steps mentioned in the affidavits. The question, therefore, is, have the Company made out that there is an impossibility of doing that which they are required to do? I think not, so far at least as commencing the proceedings, and giving themselves a locus standi.

ERLE, J.—It has been assumed throughout the argument, that the obtaining a private Act, enabling parties to execute a work such as this, creates a legal obligation upon the parties to complete the works authorised. Therefore the only question now is, whether the applicants have come to this Court within a reasonable time; and whether there is sufficient time for the performance by the defendants of a clear legal duty. I think that the defendants have not shewn that there is not sufficient time. The broad proposition, that the special Act imposes upon the Company an obligation to make this line, which may be enforced by mandamus, may require some limitation; that is open to further argument at a future stage of the proceedings.

Rule absolute.

June 13th.

REGINA *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

See placitum, ante, p. 648.

THIS was a rule calling upon the defendants to shew cause why a mandamus should not issue, directed to them, commanding them to make and complete a branch railway from Salter Hebble to Huddersfield. From the affidavits it appeared that the Company were incorporated by stat. 10 & 11 Vict. c. 163, and were entitled to raise 2,000,000*l.* That they had expended all the money raised, and were under liabilities to the amount of 100,000*l.*, and were unable to raise more money. That the powers of the

Company for the compulsory purchase of lands would expire on the 18th of August, 1851. That application to the Company to proceed in making the railway was made to them in April last. The affidavit of the engineer of the Company stated, that two months would elapse before the requisite notices could be given, and that four years would be required to complete and construct the railway. At a general meeting of the shareholders it had been resolved, that the making of this branch should be abandoned. This resolution was published in the local newspapers, and was notorious to all persons interested in the construction of the works of the railway.

Sir *F. Kelly*, *Peacock*, *Wilkins*, Serjt., and *Tomlinson* shewed cause.

Sir *F. Thesiger* (with whom were *Knowles* and *Addison*) contrà.

Lord CAMPBELL, C. J.—There is no distinction between this case and *Reg* v. *The York, Newcastle, and Berwick Railway Company*, by which this case must be governed.

PATTESON, J., COLERIDGE, J., and ERLE, J., concurred.

Rule absolute (*a*).

(*a*) See *Reg.* v. *York and North Midland Railway Company*, 20 L. J., Q. B., 507; and *Sparrow* v. *Oxford, Worcester, and Wolverhampton Railway Company*, cor. Lords Justices, 21st Nov. 1851.

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Hilary Term, 1851.

Feb. 22*nd.*

LAWRENCE *v.* THE GREAT NORTHERN RAILWAY COMPANY.

A Railway Company being about to construct their line through the land of C., it was agreed that it should be referred to an arbitrator to fix the amount of the purchase-money, and the compensation to be paid for the injury and damage to the remaining estate by severance and otherwise. The arbitrator awarded that 7990*l.* be paid for the purchase of the land, to include all injury and damage to the estate of the said C., by severance or otherwise:—*Held*, that the compensation awarded related only to all damage known or contingent, by reason of the construction of the Railway on the lands purchased of C., and to other damage arising from the construction of the Railway at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and did not embrace also all contingent and possible damage which might arise afterwards by the works of the Company at other places, and which could not have been foreseen by the arbitrator.

The defendants' Railway passed across low lands adjoining a river, over which the flood waters used to spread themselves. Those low lands were separated from the plaintiff's land by a bank, constructed under certain drainage Acts, and which protected the plaintiff's land from the floods. By the construction of the defendants' Railway without sufficient openings, the floods could not spread themselves as formerly, and were penned up and flowed over the bank on the plaintiff's land:—*Held*, that, though the defendants had constructed their line according to the provisions of their Act, they were liable for an unforeseen injury to the plaintiff, arising from the mode in which the Railway was constructed.

CASE.—The first count of the declaration stated, that the plaintiff was lessee of Sir W. B. Cooke, and that the defendants erected an embankment across certain low lands not belonging to Sir W. B. Cooke, without leaving sufficient openings to allow the flood waters of the river Dun to escape, as accustomed; by means of which they became accumulated on the said low lands, and were forced upon the land occupied by the plaintiff.

The second count stated, that the defendants broke down a portion of a certain bank, called the Bentley flood-bank, whereby the said flood waters flowed upon the land occupied by the plaintiff.

Plea to the first count, that the said embankment was formed under the Acts of Parliament of the defendants (*a*), and was made properly, and according to the provisions of those Acts; absque hoc, that the defendants erected the embankment without leaving sufficient openings, &c.

Further plea to the first count, that, before the plaintiff had anything in the lands now in his occupation, the defendants gave notice to Sir W. B. Cooke, who was then interested in the said close in reversion, to purchase certain lands of his, adjoining those now of the plaintiff; that it was referred to an arbitrator to fix the amount of the pur-

(*a*) See 9 & 10 Vict. lxxi. ss. 162-3.

chase-money, and of compensation for injury to the lands and the remaining estate of Sir W. B. Cooke by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made; that he awarded 7900*l.*, which was to include compensation for all injury and damage to the estate of the said Sir W. B. Cooke by severance or otherwise, and directed what should be constructed; that the money was paid, and the works done.

Replication, de injuriâ.

The cause was tried at the Summer Assizes for York, 1850, when it appeared, that, in 1849, the plaintiff was the tenant to Sir W. B. Cooke of the close mentioned in the declaration. That the Railway of the defendants passes along the low lands adjoining the river Dun, over which the flood waters of that river used to spread themselves. Those low lands were separated from the plaintiff's land by a bank, called the Bentley flood-bank, constructed under certain drainage Acts, and which protected the plaintiff's land from the floods. By the construction of the defendants' Railway in 1846, without sufficient openings, these flood waters could not spread themselves as formerly, and were penned up, and flowed over the bank on the plaintiff's land.

In 1847, an agreement was entered into between Sir W. B. Cooke, who was the owner of the plaintiff's land and also of other land through which the Railway passed, and the Company, that certain lands mentioned in the schedule, not including those occupied by the plaintiff, should be sold to the Company; and that compensation should be paid for all injury and damage to the remaining estate of the said Sir W. B. Cooke by severance or otherwise, to be settled by an arbitrator, who was duly appointed under 8 Vict. c. 18, s. 68, and awarded, "That 7990*l.* be the price to be paid to the said Sir W. B. Cooke by the said Great Northern Railway Company, for the purchase of the land and premises so mentioned in the said schedule, the amount being

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twenty-nine acres, which I adjudge shall be taken to include compensation for all injury and damage to the estate of the said Sir W. B. Cooke, by severance or otherwise." The sum awarded was duly paid. It was insisted at the trial, that that sum must be taken to include all contingent future damage, caused by the construction of the Railway, to land belonging to Sir W. B. Cooke; and consequently to cover the injury sustained by the plaintiff. However, the plaintiff, under the direction of his Lordship, had a verdict for 70*l.* on the first count, and 10*l.* on the second, leave being reserved to the defendants to move to enter the verdict for them on the first count.

Knowles having, in Hilary Term, obtained a rule accordingly,

Hugh Hill and *O. Farrer* now shewed cause (*a*), and contended, that the defendants were liable; and that the arbitrator could never have taken into his consideration the damage thereafter occasioned by the improper construction of the works. They cited *Skerratt* v. *The North Staffordshire Railway Company* (*b*), *Braynton* v. *The London and North Western Railway Company* (*c*), and *Lee* v. *Milner* (*d*).

Knowles, *Watson*, and *R. Hall*, contrà, contended—First, that, the works being constructed by virtue of an Act of Parliament, the defendants were not liable for damage occasioned thereby. Secondly, that the compensation awarded was intended to include all kinds of damage. They cited *Hodsoll* v. *Stallebrass* (*e*), *Clegg* v. *Dearden* (*f*), *Rex* v.

(*a*) Before *Patteson*, J., *Wightman* J., and *Erle*, J.
(*b*) Ante, Vol. 5, p. 166.
(*c*) Ante, Vol. 4, p. 553; *S.C.*, 10 Beav. 238.
(*d*) 2 Y. & C. 611.
(*e*) 11 A. & E. 301.
(*f*) 12 Q. B. 576.

Leeds and Selby Railway Company (*a*), *Dunn* v. *Murray* (*b*).

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court. —The plaintiff is lessee of certain lands under Sir W. B. Cooke, and he brings this action for an injury to his land, by its being flooded, as he alleges, by the fault of the defendants in constructing their Railway across the lands of other persons, without leaving sufficient openings for the passage of flood waters, whereby they were obstructed and penned up, and forced upon the lands of the plaintiff. The defendants plead, that, before the plaintiff had anything in the lands now in his occupation, they gave notice to Sir W. B. Cooke to purchase certain lands of his, adjoining to those now of the plaintiff; that it was referred to an arbitrator to fix the amount of the purchase-money, and of compensation for injury to the lands and other estates of Sir W. B. Cooke, by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made; that he awarded 7990*l.*, and directed what should be constructed; that the money was paid, and the works directed were done.

The main point in the case is, whether that compensation relates only to all damage, known or contingent, by reason of the construction of the Railway on the lands purchased of Sir W. B. Cooke, and to other damage arising from the construction of the Railway at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded; or whether it embraces also all contingent and possible damages which might arise afterwards by the works of the Company at other places, and which could neither be foreseen nor even guessed at by the arbitrator. The pro-

(*a*) 3 A. & E. 683. (*b*) 9 B. & C. 780.

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position that it was to be taken to embrace such damages is so startling, that we should expect some express provision to be pointed out to that effect, either in the general Acts relating to railways, or the special Act under which this Railway was constructed, or the instrument of reference. We have examined all these, and are not only unable to find any such express provision, but any clause whatever which can fairly have any such interpretation put upon it. We are therefore clearly of opinion that the compensation must be taken in the restricted sense contended for by the plaintiff.

But it is contended by the defendants, that they have constructed their Railway according to the provisions of their special Act, 9 & 10 Vict. c. lxxi., and are not liable for any consequences which may follow, to the damage of the plaintiff. The Railway passes across the low lands adjoining the river Dun, over which the flood waters of that river used to spread themselves. Those low lands were separated from the plaintiff's land by a bank, constructed under certain drainage Acts, and which protected the plaintiff's land from floods. By the construction of the defendants' Railway, without sufficient openings, those flood waters could not spread themselves as formerly, and were penned up, and flowed over the bank on the plaintiff's land. Primâ facie this would give the plaintiff a cause of action, and the question is, whether the Company are protected by their Act. Now, the 162nd section obliges them to make openings when the Railway crosses any public drains, embankments, or works made in any drainage district, but it is silent as to flood waters. The 163rd section, indeed, obliges them to make openings for flood waters in another district in another county, and is relied on by the defendants, on the principle "expressio unius est exclusio alterius;" and certainly, so far as any remedy by mandamus or otherwise, to compel them to make openings for flood waters in the Dun district, might be attempt-

ed to be enforced, the Act would not warrant it. The Company may have been at liberty under the Act to construct their Railway across the low lands in the manner they have done; but it does not follow, that, in case an unforeseen injury arises to any one from the mode in which it is constructed, they are not liable to an action.

It was, indeed, held in *Rex* v. *Pease* (*a*), that where an Act of Parliament authorised the making of a railway parallel and near to a highway, the Company were not answerable for injuries sustained in consequence of horses passing along the highway being frightened; but there, the proximity of the highway being expressly authorised by the Act, and the railway being used in the proper and ordinary manner, it was impossible to hold the Company responsible, without in effect repealing the Act of Parliament. Here the Company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think that the want of such caution is sufficient to sustain the action.

The injury on the second count was expressly found by the jury.

The rule to enter a verdict for the defendants must be discharged.

Rule discharged.

(*a*) 4 B. & Ad. 30.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

July 4th.

KINNERSLY *v.* THE NORTH STAFFORDSHIRE RAILWAY COMPANY (*a*).

By an Act of Parliament, with which the Lands Clauses Consolidation Act was incorporated, it was enacted, that the powers of taking land compulsorily for the purpose of making a certain Railway, should not be exercised after the expiration of three years from the period of the passing of the Act. The Company gave notice to a landowner of their intention to take a part of his land, but took no other step until three days before the expiration of their compulsory powers, when they delivered a bond, and proceeded to take possession under the 85th section of the Lands Clauses Consolidation Act. The landowner thereupon filed his bill, praying an injunction to restrain the Company from proceeding further with the purchase, on the ground that their compulsory powers had ceased.

The Vice-Chancellor granted the interim injunction, but directed a case for the opinion of the Court of Exchequer.

BY an Act, called the North Staffordshire Railway (Potteryline) Act, 9 & 10 Vict. c. lxxxv., which received the royal assent on the 26th of June, 1846, with which the General Consolidation Acts were, by the 1st section, incorporated, certain persons were united into a Company and a body corporate, for the purpose of making a railway from the Macclesfield Branch of the Manchester and Birmingham Railway to join the line of the Trent Valley Railway, and also several branch lines therein specifically mentioned, one of which was designated "The Newcastle Branch."

The plaintiff in this case was the owner in fee of certain lands which the said Company were empowered to take for their Railway; and, on the 19th of June, 1847, he received a notice of the Company's intention to treat for the purchase of such portion of his lands as was described in a schedule subscribed to the notice.

By another Act of Parliament, (10 & 11 Vict. c. cviii., which received the royal assent on the 2nd of July, 1847,) the Act before referred to, and two other Acts therein also referred to, for making certain other Branch Railways, were repealed; and by the 1st section of the Act of 1847, it was provided, that the repeal of the said Acts should not repeal or revive any corporation thereby declared to be

(*a*) See *Reg.* v. *Birmingham and Oxford Junction Railway Company*, ante, p. 628; and *Reg.* v. *The York, Newcastle, and Berwick Railway Company*, ante, p. 648.

dissolved, and should not annul or in anywise prejudice or affect any purchase, sale, conveyance, grant, contract, mortgage, security, act, matter, or thing whatsoever, theretofore made, done, committed, or executed under or by virtue or in pursuance of, or recognised and confirmed by, the repealed Acts or any of them; but all such purchases, sales, conveyances, grants, contracts, mortgages, securities, acts, matters, and things should be, and the same were thereby declared to be, as good, valid, and effectual, to all intents and purposes, as if the said Acts had not been repealed. By the 4th section it was enacted, that the Companies Clauses Consolidation Act, the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act, were, so far as they were not modified by or inconsistent with the provisions of the special Act, incorporated therewith. By the 34th section it was, among other things, enacted, that, subject to the provisions and powers of deviation in the Lands and Railways Clauses Consolidation Acts, and in the said Act contained, and except as thereinafter excepted, it should be lawful for the Company to make or complete and maintain the Railways as the same were described in the repealed Acts, in, through, and upon the lands delineated on the plans and described in the books of reference, and according to levels described on the sections, and to enter upon, take, and use such of the lands as should be necessary for the purpose. By the 77th section it was enacted, that the powers of the Company for the compulsory purchase of lands required for the purposes of so much of the works by that Act authorised, as were also authorised by the repealed Acts, should not be exercised after the expiration of three years from the period of the passing of the said Acts. And by the 78th section, it was enacted, that the Railways authorised by the repealed Acts should be completed within seven years from the period of the passing of such Acts; and the Railways by that Act

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authorised to be made should be completed within seven years from the passing thereof; and all powers by that Act and by the Companies Clauses, Lands Clauses, and Railways Clauses Consolidation Acts, or any of them, granted to the Company for executing the Railways, or otherwise in relation thereto, should, on the expiration of such of the periods by which any of the Railways ought to be completed pursuant to the provisions of the said Act, cease to be exercised as to the Railway which ought to have been completed by such period, except as to so much of the Railway as should be then completed.

Shortly after the notice of the 19th of June, 1847, a correspondence was carried on respecting the land required by the Company, which was closed in the month of October following, by two letters from the plaintiff's solicitor to the solicitor of the Company, in one of which he offered to treat with the Company for the sale of two pieces of land, Nos. 196 and 199; and in the other of which letters he declined to treat as to the rest of the land included in the notice, until certain matters relative to a canal therein mentioned had been settled.

Nothing further was done, and the works of the Newcastle Branch were for some time altogether suspended; but the plaintiff hearing, on the 28th of March, 1849, that the suspended works were to be resumed, wrote by his solicitor to the solicitors of the Company reminding them that no reply had been given to his former letters, and intimating that the Company would not be permitted to enter on the land; and the plaintiff at the same time withdrew his former offer to treat as to the pieces of land numbered 196 and 199.

The Company afterwards by letter offered 3000*l.* for the land, which the plaintiff refused to accept.

On the 23rd of June, 1849, the Company delivered a bond to the plaintiff, and deposited the sum of 2292*l.* 12*s.* 6*d.*,

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and proceeded to enter upon the plaintiff's land, under the provisions of the 85th section of the Lands Clauses Consolidation Act.

The bill charged, that the power of the Company for the compulsory purchase of land expired on the 26th of June, 1849, being three years from the passing of the first-mentioned Act; and that the Company had not previously thereto taken any steps for settling the amount of the compensation to be paid for the plaintiff's interest in the lands, in the manner provided for by the Lands Clauses Consolidation Act; and that, at the date when the bond was delivered, and before the 26th of June, they could not have taken any steps towards ascertaining compensation, inasmuch as ten days' notice would have been necessary before the Company could have issued their warrant for summoning a jury.

The bill prayed a declaration, that the powers of the Company for the compulsory purchase of the plaintiff's lands and hereditaments expired on the 26th day of June, 1849, and thereupon ceased and were not exerciseable. And that the proceedings of the Company under the 85th section of the Lands Clauses Consolidation Act, 1845, were irregular and of no effect; and that the Company might be restrained by injunction from entering upon or continuing in possession of the said lands and hereditaments or any part thereof, and from digging or excavating or doing or executing any railway or other work in and upon the said lands and hereditaments or any part thereof, and from issuing any warrant to the sheriff of the said county of Stafford, requiring him to summon a jury for the purpose of determining the amount of compensation to be paid to the plaintiff for the purchase of the said lands and hereditaments, and from exercising any other power or doing any act for the purpose of compulsorily taking possession of the said lands and hereditaments, or purchasing or acquiring any interest in the same.

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It appeared, at the hearing, that subsequently to the present notice of motion having been served on the plaintiff, the Company had given notice of their intention to proceed to Parliament to obtain an extension of the time for taking land compulsorily.

Mr. *Rolt* and Mr. *Amphlett* for the plaintiff, in support of the motion, contended that the Company could not now proceed to take the plaintiff's land without his consent; and they relied chiefly on the case of *Brocklebank* v. *The Whitehaven Railway Company* (*a*). That no binding contract had been entered into previously to the time at which the powers of the Company to take land compulsorily expired. That no price had been fixed for the land; and that the proceedings under the 85th section, as to the deposit, were entirely ex parte, and not binding on the plaintiff. That a Court of equity would not enforce a contract in which the chief element, the price, was undetermined.

Mr. *Malins* and Mr. *Bovill*, for the Company, contended that the notice created a special contract between the parties; and that the relation of vendor and purchaser was established by the delivery of the notice: *Doo* v. *The London and Croydon Railway Company* (*b*), *Stone* v. *The Commercial Railway Company* (*c*), *Tawney* v. *The Lynn and Ely Railway Company* (*d*). That the Court always considered on which side the balance of inconvenience would incline, in the event of its granting the interim injunction; that it was obvious, that, in the present case, it would wholly fall on the Company, who were compelled to complete their line within seven years from the passing of the Act, while the plaintiff could get every remedy and

(*a*) Ante, Vol. 5, p. 373.
(*b*) Ante, Vol. 1, p. 257.
(*c*) Ante, Vol. 1, p. 375.
(*d*) Ante, Vol. 4, p. 615.

compensation under the 68th section of the Lands Clauses Consolidation Act. That the case of *Brocklebank* v. *The Whitehaven Railway Company* was materially different from this, for the Lands Clauses Consolidation Act was not then passed. That, on the one side, it was only a question of the price the Company were to pay for the land; on the other, whether the formation of the Railway was to be proceeded with at all. That the injunction would have the effect of repealing the Act of Parliament for the making of the Railway. That in *Brocklebank's case* the money had not been paid, and the Company had not entered into possession; in this the money had been deposited, and the Company were actually in possession. That if the entry was lawful under the 85th section, no subsequent proceedings could render it illegal. That the plaintiff was then in a position to exercise the power given him by the Act for summoning a jury or proceeding to arbitration: *Walker* v. *The Eastern Counties Railway Company* (*a*), *Regina* v. *The Deptford Pier Company* (*b*).

The VICE-CHANCELLOR (without hearing the reply).—I will begin with the two last observations that have been made. With respect to the case in the Court of Queen's Bench, it only proves that, although the time had expired, the Court thought the party was entitled to be paid; that is all which that case decides. And as for this last point of possession, the Company may have obtained it; but such possession is only with reference to a purchase; and if the purchase cannot be completed, then I apprehend that the Company will not get any title to retain possession.

How, then, does this stand? In the case of *Brocklebank* v. *The Whitehaven Railway Company* the Lord Chancellor thought that my direction, that there should be an injunction, was wrong, if grounded on the construction of the

(*a*) Ante, Vol. 5, p. 469. (*b*) 8 A. & E. 910.

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statute; but although his Lordship seems to have thought so, he does not appear to have carried out that opinion; and he certainly, by the case he directed, virtually shewed his opinion, that at least it was so grave a question on behalf of the landowner, that it might be right, pending the question, to grant the injunction. I cannot exactly say what the precise language in the special Act was, for the special Act in the case of *Brocklebank* v. *The Whitehaven Railway Company* passed before the existence of the Lands Clauses Consolidation Act; but it appears from the report that the compulsory powers of the Company to take or purchase lands were not to be exercised after the expiration of three years from the passing of the Act. Now the language in this Act, which gave the power to make the particular branch in question, is this: —"Be it enacted, that the powers of the Company for the compulsory purchase of lands required for the purpose of so much of the works by this Act authorised as were also authorised by the said recited Acts, shall not be exercised after the expiration of three years from the period of the passing of the said Acts." It refers to all the powers collectively; and I apprehend, that if the circumstances of the case are such that the price which ought to be paid can by no means be ascertained, the Court will never look on the mere formal serving of the notice to treat by the Company upon the purchaser, as a contract which will enable them to keep the land without paying any price for it.

There is a distinction to be drawn between what is to be considered as the effect of the Company serving the notice to treat, in cases where there is no question about the power to fulfil the contract, as far as time is concerned, and the particular case where the question, whether the power has not expired, is the material question to be decided; and it seems to me, that the language of the proviso being, that the powers of the Company for the compulsory

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purchase of land are not to be exercised after the expiration of three years, raises at least a very grave question, whether, inasmuch as the Company have allowed the three years to pass before they have taken the final step for determining what ought to be paid, the whole thing is not now virtually at an end. With reference to this, it appears that the notice to treat was served on the 19th of June, 1847; and that there was some correspondence; and that a letter was written by the solicitor for the plaintiff to the gentlemen who represented the Company, in the month of October, 1847, to which no reply whatever was sent; nor, as I observe, was anything further done. There was then a letter written in March, 1849, by the Company to the plaintiff's solicitor, to which there was no reply; and nothing passed till the 5th of June, 1849, when the Company wrote to the plaintiff, and afterwards took these late proceedings.

Now, it seems to me, that there is really a very grave question, and I cannot but think that the proper course is to have that question decided by a Court of law. I do not understand that the Company are in possession, in the sense of actually using the lands; nor is the possession of such a nature as that the cessation of it would, in the opinion of the Court, inflict an injury on the Company. The mere driving a stake, and so on, is not the same thing as if they had taken possession and erected buildings, or done anything of that sort; it is merely what I may call a moonshine possession, but nothing in substance.

I shall, therefore, make the order for the injunction according to the words of the notice of motion, and direct a case to be tried by the Court of Exchequer, in which the question will be, whether the Company are now authorised to issue the warrant (in the language of the Act) for the purpose of determining what purchase-money is to be paid; with liberty to apply.

1850.

BEFORE THE MASTER OF THE ROLLS AND THE LORD CHANCELLOR.

March 23*rd*.
April 22*nd* & 30*th*.
May 1*st*.

CARLISLE *v.* THE SOUTH EASTERN RAILWAY COMPANY.

THE bill in this case was filed by Thomas Carlisle on behalf of himself and all other the shareholders in the South Eastern Railway Company, except the defendants, against the South Eastern Railway Company, and against twelve directors of that Company.

The prayer of the bill was, that it might be declared, that under the circumstances therein and hereinafter stated, the payment of any dividends by the South Eastern Railway Company was illegal, and ought not to be made; and that the South Eastern Railway Company, and the directors of the Company, and the secretary, treasurer, banker, and agents of such Company and directors, might be restrained from paying any dividend upon any shares in the said Company, and that whether such dividend should have been declared, or thereafter should be declared, until so much of the Railway by the Brighton, Lewes, and Hastings Railway Act—Hastings, Rye, and Ashford Extension, 1845, (8 & 9 Vict. c. cc.) authorised to be made, as had been transferred to the South Eastern Railway Company, should be opened to the public for traffic.

The 42nd section of the 8 & 9 Vict. c. cc., provides, "that if so much of the Railway by this Act authorised to be made, as may be transferred to the South Eastern Railway Company, shall not be completed within three years from the completion of such transfer, it shall not be lawful, after the expiration of the said period, for the South Eastern Railway Company, unless authorised by Parliament so to do, to pay any dividend until the whole of the said Railway shall be opened to the public for traffic."

The transfer was completed, and although more than three years had expired since such completion, the Railway was not opened for traffic. The South Eastern Company nevertheless, at three intervals of half a year each, declared three dividends, two of which were duly paid. A holder of a particular class of shares, who had received interest thereon, filed his bill on the same day on which the third dividend was declared, on behalf of himself and all other the shareholders of the Company except the directors, praying an injunction to restrain the Company from paying any dividend, whether declared or thereafter to be declared, until the Railway in question had been opened to the public for traffic. *The Master of the Rolls* granted an injunction as to future dividends, but *held* that the Court might exercise its discretion as to the dividend then declared, and gave liberty to the defendants to make out a case by affidavit to induce the Court not to interfere.

The defendants having failed to satisfy the Court, the Master of the Rolls granted the injunction as to the dividend then declared, but not yet paid.

The Lord Chancellor on appeal discharged so much of the order of the Court below as restrained the payment of the dividend declared before the injunction issued, and affirmed the rest of the order.

Held, that the right of each shareholder to a declared dividend is a separate interest, and cannot be represented by a plaintiff suing on behalf of himself and all other shareholders.

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It appeared from the bill, which was filed on the same day as that on which a half-yearly dividend of the shares of the South Eastern Railway Company had been declared at a general meeting of the Company, and from the affidavits filed in support of the present motion:—That there were three Railway Companies, The London and Brighton, The Brighton, Lewes, and Hastings, and The South Eastern, all of whom were in competition with reference to a line of railway from Ashford, in the county of Kent, to Bulverhithe in the county of Sussex. Some works had been commenced, and some were in contemplation, when an Act of Parliament, 8 & 9 Vict. c. cc., was passed, to enable the Brighton, Lewes, and Hastings Company to make the line in question; and by the 39th section of that Act it was enacted, as follows:—"That it shall be lawful for the Brighton, Lewes, and Hastings Company, with the consent in writing of the London and Brighton Railway Company under their common seal, by any deed or instrument under their corporate seal, to transfer to the South Eastern Railway Company all the powers by that Act conferred with reference to the purchase of lands, and execution of so much of the Railway by this Act authorised as lies between a point in the parish of St. Leonard's and Ashford, and the maintenance and use thereof, and the levying and recovery of tolls and charges in respect of the same; and on the execution of such transfer it shall be lawful for the South Eastern Railway Company to use, exercise, and enjoy all the powers aforesaid, so far as the same relate to that portion of the said Railway, in relation to which such powers may be transferred to them, in like manner as though they had been specifically authorised so to do in lieu of the Brighton, Lewes, and Hastings Railway Company; and such portion of the said Railway, when extended, shall be and become part and parcel of the undertaking of the South Eastern Railway Company. By the 40th section, it was enacted, that, for the purpose of executing the said Railway, it should be lawful for the

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South Eastern Railway Company to raise, by the creation of new shares, the sum of 410,000*l.*; and, when one half of the said sum should have been paid up, to borrow on mortgage the sum of 136,000*l.*; and also to apply to the formation of the said Railway any portion of the capital which they were at that time authorised to raise.

The 42nd section of the same Act provided as follows: —"That if so much of the Railway by this Act authorised to be made, as may be transferred to the South Eastern Railway Company, shall not be completed within three years from the completion of such transfer, it shall not be lawful, after the expiration of the said period, for the South Eastern Railway Company, unless authorised by Parliament so to do, to pay any dividend until the whole of the said Railway shall be opened to the public for traffic."

By an indenture, dated the 21st of August, 1845, and made between the Brighton, Lewes, and Hastings Company, of the first part, the London and Brighton Company, of the second part, and the South Eastern Company, of the third part: The Brighton, Lewes, and Hastings Company, with the consent of the London and Brighton Company, transferred unto the South Eastern Company all the powers by the Act of the 8 & 9 Vict. c. cc., conferred on the Brighton, Lewes, and Hastings Company, with reference to the purchase of lands and the execution of so much of the Railway by the said Act authorised to be made, as laid between the said point in the parish of St. Leonard, where the Brighton, Lewes, and Hastings Company intended to make a station, and Ashford, and the maintenance and use thereof, and the levying and recovery of tolls and charges in respect of the same, in as full and ample a manner as the Brighton, Lewes, and Hastings Company could or might have exercised the same powers.

By certain Acts of Parliament, passed in the 9th & 10th of Victoria, the defendants, the South Eastern Railway Company, were authorised to make certain other lines of railway, and for the purposes of those Acts to raise

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3,000,000*l.* and upwards, by the creation of new shares or stock, and by mortgage, in addition to any other sums which they were already authorised to raise, upon such terms and in such manner as might be or might have been agreed upon at any general meeting or meetings of the Company; and the new shares or stock to be created by virtue of those Acts were to be considered part of the general capital of the Company. At general and special meetings of the Company, held on the 11th of September, 1845, and the 10th of September, 1846, certain resolutions were passed for raising large sums of money for the purposes of the Acts, by the creation of new shares and the consolidation of existing shares; and these shares so issued were described as No. 3 and No. 4 shares.

The plaintiff became the purchaser of sixty of the No. 4 shares, in January, 1849, and of forty more of the same shares in the month of May following, and had paid the calls, and was the registered proprietor thereof; but it did not appear that he held any other shares in the Company.

The period of three years from the date of the completion of the transfer to the South Eastern Company expired on the 21st of August, 1848; but the portion of line transferred was not then, nor at the date of the filing of the bill, near completion.

The bill charged, that the defendants, the directors, had, notwithstanding the provisions in that behalf contained in the Brighton, Lewes, and Hastings Extension Act, and since the expiration of the three years after the completion of the transfer, paid and continued to pay dividends, which had been declared on the shares in the South Eastern Company, that is to say, a half-yearly dividend declared in the month of March, 1849, and a half-yearly dividend declared in September of the same year; and that the South Eastern Company and the directors contemplated and intended to procure another dividend on the shares to be declared (which was afterwards done) at a general meeting of the shareholders called for the 14th of March; and that they

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intended to pay such dividend forthwith after the same should have been declared.

That, under the circumstances, the payment by the defendants of any dividend on any of the shares of the South Eastern Railway Company had been, since the 21st of August, 1848, and still was, wholly illegal; and that it was out of the power of the directors or of any general meeting of the shareholders lawfully to pay or to authorise or empower the payment of any dividend on any of the shares of the Company.

The bill also charged, that the directors had expended 400,000*l.* out of capital, in order to pay interest on the No. 4 shares, in pursuance of certain resolutions to that effect, passed at a general meeting held in February, 1847; and that such payment was illegal, wasteful, and injurious to the interests of the Company; and that in consequence the capital raised on the No. 4 shares had become insufficient to complete the Railway; and that it had become necessary for the Company to apply to Parliament for power to raise additional capital, and that a bill was then before Parliament for that purpose.

The bill contained the usual allegation, that the shareholders were too numerous to be made parties to the suit.

It appeared from the affidavits of the chief clerk and secretary of the Company, that the plaintiff had received, without protest, interest half-yearly on his shares; and it further appeared, that he would not, as the holder of No. 4 shares, be entitled to any of the dividends then declared.

On the 23rd of March, the motion came on to be heard before the Master of the Rolls.

Mr. *Turner* and Mr. *Bovill*, in support of the motion, relied on the 42nd section of the 8 & 9 Vict. c. cc. which distinctly and imperatively forbad the payment of any dividend until the completion of the line.

Sir *F. Kelly*, Mr. *R. Palmer*, and Mr. *Baily*, for the de-

fendants, contended, that the question was one entirely for a Court of law to determine: *Gray* v. *The Liverpool and Bury Railway Company* (*a*), *The Attorney-General* v. *The Mayor of Liverpool* (*b*). That in the meantime the granting or withholding the injunction must depend on the balance of inconvenience; that, in the present case, the stopping the payment of the dividend would seriously affect a very large class of persons, whose means of subsistence might depend upon the receipt of the money which had been declared due to them. That the plaintiff was entitled to no favour, for he had acquiesced in the payment of two dividends; that, although it had been alleged that he was ignorant of the clause prohibiting the payment of the dividends until the completion of the Railway, that that could not be a valid excuse, for every one was presumed to know the contents of an Act of Parliament. Again, that the delay which the plaintiff had suffered to intervene between the declaration of the dividend and the application to the Court would preclude him from the extraordinary remedy he was then seeking: *Pickford* v. *The Grand Junction Railway Company* (*c*). That the dividends were in fact profits arising from the trading on another part of the line, to which the language of the 42nd section was not meant to apply. That it was never intended that the general terms of that section should have the effect of stopping the dividends payable in respect of the whole South Eastern line, but were applicable only to the dividends on the Ashford and Hastings line, which did not in fact become a portion of the South Eastern line until it was completed.

Mr. *Turner*, in reply, contended, that the words of the 42nd section were most general, and that there was nothing in the context to limit or contract their meaning; that no

(*a*) Ante, Vol. 4, p. 235. (*b*) 1 My. & Cr. 171.
(*c*) Ante, Vol. 3, p. 538.

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acquiescence or delay on the part of the plaintiff could authorise an illegal application of the dividends. That, although a plaintiff might prejudice or lose his remedy in equity by delay or acquiescence, when private rights alone were involved, this principle did not apply to cases of public policy. That, at all events, if the case was to be sent to law, the Act was sufficiently clear to authorise the Court to grant the interim injunction.

Sir *F. Kelly* then asked the Court to allow the motion to stand over for the production of affidavits to shew that the line of Railway could be completed, and that the Company had sufficient funds for that purpose, even if the dividends were now paid.

The MASTER OF THE ROLLS.—Whenever my attention has been called to matters of this description, I have always had to lay down the principle, that these Companies and their affairs are not to be dealt with merely as private partnerships and their affairs. They are constituted for the public purposes which are hoped to be effected by their means; and powers are granted wholly on certain conditions, which are to be found in the Acts of Parliament, which enable them to interfere by imperial powers with the private property of any individual which happens to be in the line of the projected railway, for the purpose, as it is supposed, of the public good. Every man's property lying on the line is taken from him without his consent; his estate is interfered with; and all the evil which must arise from the exercise of that despotic power is supposed to be compensated by the public good which is expected to be derived from the works to be accomplished by means of those powers.

Those works are to be accomplished strictly upon the conditions which are imposed by their several Acts of Parliament; and I think I may say now, after having heard a good many of these cases, that, in every instance which has come before me, the mistake of the directors—where it has turned out to be a mistake—has arisen from the

idea that they had a right to use the vast amount of property placed in their hands, and the vast amount of power given to them over that of other people, in the manner which they thought most advantageous to the Company, or most convenient to the shareholders, without having regard to the public objects and purposes intended to be effected by their Acts of Parliament. I think hardly one of these cases has occurred, in which something has not arisen in the course of it which made it my duty to remind the parties of that circumstance.

In this case it seems there were three Companies—the London and Brighton Railway Company—the Brighton, Lewes, and Hastings Railway Company—and the South Eastern Railway Company—who had some competition in relation to each other in reference to the line in contemplation. Some works had been effected, and some were in contemplation, towards the completion of part of the line of Railway from Ashford, in the county of Kent, to Bulverhithe, in the county of Sussex. The Act of Parliament was passed to enable the Brighton, Lewes, and Hastings Railway Company to make that Railway. Regard was had to the claims or the competition of the other Companies; and in consequence the powers were given which have been so particularly adverted to, and necessarily so, in the argument. There were some things to be done by the Company in whose favour this Act was granted, with the consent of the London and Brighton Railway Company; but the point which is most important is, that by section 39 there was a right given to them to transfer that portion of what I must call the important public duty which they had undertaken to the South Eastern Railway Company.

As to the question which arises as to the likelihood of these works being completed within the limited time, I can infer nothing except from this Act of Parliament. These powers were to expire in the course of seven years in case of non-completion; and if the whole of this Rail-

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way was completed, according to the construction put upon the Act by one side, it was to become part and parcel of the undertaking of the South Eastern Company. Power was given to raise capital and to receive tolls and other things which were required; and then comes the 42nd section, which has given rise to the whole question. Now the very generality of the words in this section, it is said, creates a doubt. You are not to pay any dividend till such a time; therefore, it must be construed in a limited sense. That no dividend whatever should be paid, it is said, could not be meant. And why could it not be meant? It is said, it could not be meant, because the South Eastern Railway Company has a vast capital, and a very great number of shareholders, and the dividends have been paid and were allowed to be paid during the three years to elapse before the completion of the contract. The defendants therefore say, it could not have been intended that the dividends payable to so many shareholders should be stopped, if this particular line was not completed within the three years. But is it really possible to construe these words in any other manner? I have tried in vain, in attending to the arguments which have been addressed to me with so much ingenuity; and I cannot find out that I have any good reason to construe those words so very general, "any dividend," to mean only such dividends as might arise from such part of this Ashford and Hastings Railway as might be completed before the three years. It seems to me the most extraordinary interpretation for the Court to be asked to make which could possibly be. I dare not thus palter with an Act of Parliament, especially with an Act of Parliament in which it appears to me it was intended that this should be a condition between the parties; and this Court has no power to relax it the least in the world.

I must own, therefore, that not finding any rational mode of construing this Act of Parliament, which does not necessarily infer that all the dividends of the South

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Eastern Railway Company were to be stopped if this line was not completed within the course of three years, it is my opinion that the defendants are violating this Act in what they are now proposing to do; and I have no hesitation in saying now that I must grant an injunction to restrain them from paying any dividends after this one which is now declared and about to be paid. With respect to that, I am not in the least degree disposed to close the question which has not yet been decided. I believe many of these cases, however instructive and useful they may have become to the Railway Companies who have considered them, have in a great measure taken them by surprise; for whilst they were proceeding in the frantic way in which they have been going on for many years past, they have not properly construed the powers granted to them, or considered the purpose for which those powers were granted, and they have fallen into such a habit of dealing with the funds at their disposal, that they are rather surprised when they find they are not at liberty to do anything out of the scope of the powers given to them.

When these matters come under the decision of the Court, a question cannot be raised whether the directors are or are not to be stopped when proceeding in an illegal manner; but if, by permitting some acts, not strictly legal at the present moment, I may save a great amount of suffering to the parties who have been going on in the expectation of receiving the dividends, I think I may be allowed to do something for their accommodation. I shall, therefore, give leave to the defendants, if they are so inclined, to bring forward a case on affidavit, which will raise the question for my consideration. I do not think the case is sufficiently raised on the report made by the directors to the shareholders at their meeting. I dare not give credit to these railway reports. I hope the time will come when they will be framed with so much care, and under such a scrutinizing superintendence, that what issues from a responsible body of directors will be of such value, that it

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may be taken, not as conclusive evidence, but evidence sufficient for the Court to act upon till met by contradictory evidence. That is not the case now; and therefore, if that point is to be raised by facts brought forward and proved on affidavit—and, certainly, in a case of this kind, when I cannot doubt but that great difficulty must follow upon stopping the dividend so much expected,—I shall attend to it with an earnest expectation that I may find grounds for protecting the parties from such suffering.

As to the point of acquiescence, I do not think there is anything in that. The plaintiff coming here and asking the Court to prevent a public purpose from being hindered, is not to be barred by acquiescence from making his application to this Court in the same way as a private person would be when applying for private purposes. I think I must grant the injunction as to future dividends. And if the defendants are inclined to make a case on affidavit to justify the payment of the dividend declared, I will hear it.

The motion then stood over to give the defendants an opportunity of filing affidavits.

April 16*th* & 17*th*.

Mr. *Roundell Palmer* and Mr. *Baily*, on behalf of the defendants, endeavoured to shew by the affidavits that, although the debts of the Company then exceeded their capital, yet that they had sufficient means to complete the Ashford line; that the payment of the declared dividend would not interfere with its construction; and that, in any event, a Court of Equity would not stop the progress of works on the ground alone of insufficiency of funds. They cited *Yetts* v. *The Norfolk Railway Company* (*a*) and *The Mayor of King's Lynn* v. *Pemberton* (*b*).

The MASTER OF THE ROLLS.—On the original hearing I was of opinion, that, the works being incomplete at the end

(*a*) Ante, Vol. 5, p. 487. (*b*) 1 Swanst. 244.

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of the time limited by the Act for their completion, the plaintiff was right in applying to restrain the payment of any dividend whatever; and an order would then have been made, if it had not been suggested that there was a dividend then recently declared, which might be paid without interfering with the completion of the works. It was also alleged, that the works would be completed in August next, notwithstanding the Company took out of their funds the amount of the dividend so declared. Such a statement was calculated to affect my decision. The dividend could not be withheld without a great deal of inconvenience, and perhaps suffering; and the question arose, whether the Court could relax the strict rule. I allowed the case to stand over for further information, and it has since been brought before me twice. On the first occasion I did not think the affidavits of the defendants satisfactory. Further affidavits were then filed on both sides. Now, the Act is imperative that a dividend shall not be paid unless the works are completed within a limited time. Taking it that I have a right to exercise some discretion, I have attended to the case, to see whether I could safely abstain from exercising the authority of the Court to restrain the payment of the dividend which has been declared, and I should have been glad if I could have come to that conclusion.

The affidavits of the defendants are not satisfactory; they do not of themselves satisfy me; but taken in conjunction with the affidavits on the other side, they do not answer them, and certainly are not satisfactory. The defendants say that they have funds applicable for the purpose; but the matter is not brought so fully or fairly forward as it ought to be. They say, "strike off every thing which is objected to, and there still will be sufficient." But however that may be, I do not know it; and they have declined to give any explanation in answer to the affidavits of the plaintiff; and that being so, the defendants are necessarily subject to the imputation that they cannot explain it. The question is not, whether somehow or other

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there are not funds sufficient; but whether, acting fairly to all parties, and taking everything into consideration, there are funds clearly applicable for making the line. It appears that an application to Parliament is now pending for powers to raise additional capital. If the Company will produce their books or such other evidence as they have, I will attend to any application on their behalf; but as the matter now stands, I must grant the injunction.

The defendants having applied for a case to be sent to law on the construction of the 42nd section, the Master of the Rolls directed a case for that purpose.

The defendants renewed their motion, by way of appeal, before the Lord Chancellor (*a*).

Mr. *R. Palmer* and Mr. *J. Baily*, in support of the motion.—The suit is improperly framed, inasmuch as the shareholders, other than those of the Class No. 4, to which the plaintiff belonged, were not parties and could not be represented by the plaintiff, with whom they had no community of interest: *Jones* v. *Garcia del Rio* (*b*), *Long* v. *Yonge* (*c*), *Evans* v. *Stokes* (*d*), *Richardson* v. *Larpent* (*e*), *Richardson* v. *Hastings* (*f*), *Mozley* v. *Alston* (*g*).

Secondly.—Acquiescence, or delay in suing, will affect a plaintiff's right to an injunction, even when the question arises on a prohibitory clause in an Act of Parliament: *Pickford* v. *The Grand Junction Railway Company* (*h*), *Cohen* v. *Wilkinson* (*i*).

(*a*) In consequence of the then declining health of the Lord Chancellor the case was not argued fully before him, but the cases in the text on the points adverted to were agreed by both parties to be submitted in writing for his consideration. The hearing was at the Lord Chancellor's private house.

(*b*) T. & Russ. 297.

(*c*) 2 Sim. 369.

(*d*) 1 Keen. 24.

(*e*) 2 Y. & C. C. C. 507.

(*f*) 7 Beav. 323.

(*g*) Ante, Vol. 4, p. 636.

(*h*) Ante, Vol. 3, p. 538.

(*i*) Ante, Vol. 5, p. 741.

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Thirdly.—Each shareholder would have a right of action for payment of a declared dividend, by analogy to the following cases: *Brown* v. *Bullen* (*a*), *Davis* v. *The Bank of England* (*b*), *Coles* v. *The Bank of England* (*c*), *Feistal* v. *King's College, Cambridge* (*d*); also the Act 49 Geo. 3, c. 121, as altering the law laid down in *Brown* v. *Bullen*.

Mr. *Rolt* and Mr. *Bovill*, contrà.—As to the frame of the suit: *Adair* v. *The New River Company* (*e*), *Cockburn* v. *Thompson* (*f*), *Att.-Gen.* v. *Heeles* (*g*), *Weld* v. *Bonham* (*h*), *Gray* v. *Chaplin* (*i*), *Bromley* v. *Smith* (*k*), *Preston* v. *The Grand Collier Dock Company* (*l*), *Bagshawe* v. *The Eastern Union Railway Company* (*m*), Mitford's Pl. pp. 169, 170, ed. 4; and as to the right of a shareholder to a declared dividend: *Hague* v. *Dandeson* (*n*).

May 1*st*.

LORD CHANCELLOR.—So far as regards the several matters discussed before the Master of the Rolls, and decided by his judgment, I certainly concur in the opinions he has expressed. After a careful perusal of the enactment upon which the question depends, it is, I think, impossible to give to the word "dividend" any other meaning than that of a dividend of the South Eastern Railway Company; it is the only dividend which could be made. I think, also, that there is no proof of any such acquiescence as can bar the plaintiff of the equity he seeks. There is not only no proof of the knowledge of the adverse right, and a consent by conduct in the enjoyment of it, but a positive denial of any such knowledge. The plaintiff had, indeed, the means of knowledge from the contents of the Acts under which he derived his title, and this must have deprived him of

(*a*) Doug. 408.
(*b*) 2 Bing. 393; *S. C.*, 5 B. & C. 185.
(*c*) 10 Ad. & E. 437, 449.
(*d*) 10 Beav. 491.
(*e*) 11 Ves. 429.
(*f*) 16 Id. 321.
(*g*) 2 S. & S. 67.
(*h*) Id. 91.
(*i*) Id. 267.
(*k*) 1 Sim. 8.
(*l*) 11 Sim. 327.
(*m*) Ante, p. 152.
(*n*) 2 Exch. 741.

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his equity in some cases, as against a competing equity, but cannot deprive him of a right to enforce the provisions of an Act of Parliament in favour of others having no claim at law or equity.

So much of the bill as seeks the restraint upon payment of future dividends, is simply to prevent the violation of the Act of Parliament, and also to prevent the distribution of any of the Company's funds as dividends, until certain works have been completed. This being a duty common to all the shareholders, and probably a benefit to all, the bill on behalf of the plaintiff and all other shareholders, except the directors, would be one of the ordinary description in which the practice of the Court permits such representation in pleading; and so far I think the pleadings proper, the case proved, and the injunction right. But here the difficulty of the case appears to me to begin.

The dividend was declared on the 14th of last March, at which time there was no injunction; and however illegal and improper it may have been so to violate the provisions of the Act, the question I am considering is, whether the plaintiff in this suit, constituted as it is with respect to parties, can maintain the injunction so far as regards the dividend so declared, supposing the injunction against the payment of such dividend had been the only relief prayed. The plaintiff, and others, entitled to shares No. 3 and 4, are not entitled, at present, to any dividend; but the great body of the shareholders of the South Eastern Railway Company are, or rather would be, but for the prohibition upon which the injunction is founded. How are these other shareholders represented? Not by the plaintiff and those associated with him, which in terms they are, because the bill contends that the dividend so declared ought not to be paid; but all those other shareholders are interested in contending that it ought, and insist that, whatever may be the rule as respects the Company, the declaration of the dividend gave to each and every of those in whose favour it was made a separate and distinct right to the sum

so allotted to him, and so created an interest directly opposed to the case made, and the relief prayed by the bill.

I do not inquire what remedy each shareholder may have for a dividend declared in his favour, and not paid; but the payment being to be made out of the funds of the Company, the claim must be adverse to the Company, and cannot be represented by those who take upon themselves the interests of the Company. The cases of *Davis* v. *The Bank of England* (*a*), and *Coles* v. *The Bank of England* (*b*), shew at least, that, at law, the title of a party to whom a dividend is payable, is recognised as a separate and independent right. As to the dividend declared, therefore, there is not only no community of interest, but a direct adverse interest as between the plaintiff and those other shareholders, and no bill on behalf of the two can be maintained.

This being so, these shareholders are not represented at all, for there are no defendants representing their interests, if that would have been sufficient, which I by no means assume. The only defendants are the directors as such, there being, as I believe, no allegation of their being shareholders. The result is, that these shareholders, whose dividends are thus stopped, are not in any shape parties to the suit, nor can they in any manner intervene in it; but they are most grievously affected by the injunction if it ought not to have affected the dividend declared; and in what situation does the order leave them and the Company? The injunction cannot deprive these shareholders of any remedy they may be entitled to at law or in equity for payment of the declared dividend, or protect the Company against any such claim. Each shareholder may therefore institute proceedings for that purpose; and the Company, if they can support an injunction, would have to obtain it in each particular case—a course of proceeding leading to infinitely more litigation and difficulty than would arise from making all the shareholders parties to

(*a*) 2 Bing. 393; *S. C.*, 5 B. & C. 185. (*b*) 10 A. & E. 449.

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the plaintiff's bill, if that were necessary. In neither way would the course of proceeding be satisfactory or well adapted to meet the exigencies of the case; but this possible state of things has been foreseen, and no remedy suggested. In *Mozley* v. *Alston* (*a*), I am reported to have said—"Where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all, subject, however, to this restriction, that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent have all of them an interest identical with his own; for, if what is asked may, by possibility, be injurious to any of them, those parties must be made defendants, because each and every of them may have a case to make adverse to the interest of the parties suing: *Taylor* v. *Salmon* (*b*), *Walworth* v. *Holt* (*c*). If, indeed, they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided." In *Richardson* v. *Larpent* (*d*), and *Evans* v. *Stokes* (*e*), the difficulty occurred, but the objection prevailed.

Many cases may occur in which this difficulty must lead to a failure of justice; and it is much to be wished that some remedy could be suggested for it. I have, in this case, only to deal with the facts as I find them upon these pleadings; and in truth the real difficulty so leading to a failure of justice, does not arise in this case. Until the dividend was actually declared, the plaintiff's remedy was without difficulty; and his failure, as to part of what he asks, arises only from his being too late in his application. Had the dividend been paid as well as declared, he could not, in such a suit as this, have asked for repayment from the shareholders; and for the purpose of this suit, and the form in which it is brought before me, I consider the two

(*a*) Ante, Vol. 4, p. 636.
(*b*) 4 My. & Cr. 134.
(*c*) 4 My. & Cr. 619.
(*d*) 2 Y. & C. C. C. 506.
(*e*) 1 Keen. 24.

cases as falling within the same principle. My order, therefore, is, that so much of the injunction as restrains the payment of any dividends declared before the injunction, be discharged; and that the rest of the order be affirmed.

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BEFORE THE HOUSE OF LORDS (*a*).

LETTS *v.* THE LONDON AND BLACKWALL RAILWAY COMPANY.

1851.
March 10*th*.
August 8*th*.

In the city of London, in lieu of tithes, the incumbents of several parishes were, by virtue of a decree made under the authority of an Act of Parliament, entitled to a money payment after the rate of 2*s*. 9*d*. in the pound upon the houses and buildings in their respective parishes.

THIS was an appeal from a decree of Vice-Chancellor *Wigram*, by which it was declared that the Rev. John Letts, the plaintiff in the suit, and the present respondent, was entitled, subject to the deductions thereinafter mentioned, to be paid tithes after the rate of 2*s*. 9*d*. in the pound on the annual values of houses and other buildings taken by the defendants the London and Blackwall Railway Company, as such annual values had been agreed upon between the rector for the time being of the parish of St. Olave, Hart-street, in the city of London, and the respective occupiers for the time last before Lady-day,

In August, 1839, a Railway Company obtained an Act of Parliament, and took thirty-three of the houses in the parish of St. Olave; and, by the 33rd section of one of their Acts, the Company were bound, for the purpose of indemnifying the rector, to pay such yearly sums in respect of such houses, "according to the last assessments thereof, to the 25th of March last," as would be equal to the loss in tithes which the rector might sustain for want of occupiers by reason of such taking. No assessment had been made at the date mentioned in the Act, but the rector had received, in some cases, 2*s*. in the pound upon an agreed sum (being less than the actual rental) from all inhabitants except public Companies, from whom he received 2*s*. 9*d*. upon the full annual value.

The rector now claimed 2*s*. 9*d*. in the pound upon the full annual value of the houses taken by the Company during the period the ground remained unoccupied:—*Held*, by the Lord Chancellor, reversing the decision of Vice-Chancellor *Wigram*—

That the measure of indemnity to which the rector was entitled, was the rate and computation which had been adopted by him and the tithe payer previously to the establishment of the Company.

That no actual assessment having been made, the amount claimed by the rector, and paid by the occupiers to the 25th March, 1839, constituted the "assessment" referred to in the Act.

That, in computing the amount of compensation to be paid by the Company to the rector, the Company should be allowed credit not only for such tithe-rent as should have been received, but also for such tithe-rent as should have become payable in respect of new buildings erected on the site of these houses taken by the Company.

(*a*) Present, The Lord Chancellor, Lord *Brougham*, and other Lords.

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1839; and in case, as to any of the said houses and other buildings, no such agreement should be proved to have been entered into, then the annual sum last collected by way of tithe thereon, was to be taken as representing 2*s.* 9*d.* in the pound on the annual value thereof; and the Master was, amongst other things, ordered to take an account of all sums received by the plaintiff from the Company, or any other persons, for tithes in respect of the houses &c. taken by them, or in respect of any new houses erected by the Company on the site thereof; and the Master was ordered to deduct the amount of the sums so received from what he should find due for tithes, and state the balance.

The facts and arguments of counsel in this case, which are stated in the former report, ante, Vol. 4, p. 530, are also briefly referred to in the judgment hereinafter given.

The main question arose with respect to the construction to be put on the 33rd section of The London and Blackwall Railway Act, 2 & 3 Vict. c. xcv (*a*).

(*a*) The 33rd section, after reciting, that, for indemnifying (among others, the rector of St. Olave, Hart-street) their respective successors, heirs, and assigns, against such loss as might otherwise accrue to them respectively, by reason of taking down or using, for the purposes or under the powers of the Act, any houses or other buildings in the said parishes, any or either of them, enacted as follows:—"that, after the occupier or occupiers of any of the houses or other buildings to be taken down, for the purposes or under the powers of this Act, within the said parishes, any or either of them, shall have quitted possession thereof in pursuance of this Act, and in the meantime, and until new houses and other buildings shall be erected, completed, and occupied, on the ground which shall be cleared under any of the provisions of this Act within the said parishes, or any or either of them, or on some part thereof, of such an annual rent or value that the tithes or yearly sums of money by way or in lieu of tithes, for the time being actually payable for such new houses or other buildings, shall be fully equal to the tithes or yearly sums of money by way or in lieu of tithes payable for the houses or other buildings so for the time being quitted by the occupiers thereof as aforesaid, within the said pa-

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Mr. *W. P. Wood* and Mr. *Bigg*, for the appellants.

The *Solicitor-General* and Mr. *Speed*, for the respondents.

Mr. *W. P. Wood* (*a*) replied.

The LORD CHANCELLOR, in moving the judgment of the House, said—This case, my Lords, is before the House by way of appeal against a decree pronounced by the late Vice-Chancellor Sir *James Wigram* in a cause in which the Rev. John Letts, the rector of the parish of St. Olave Hart-street, City, was the plaintiff, and the Blackwall Railway Company, the defendants. The plaintiff by this suit seeks to obtain a decree for the payment of a sum of money as compensation in lieu of tithes, under the provi-

rishes or any or either of them, the tithes or yearly sums of money, or customary payments in lieu of tithes, payable in respect of the houses or other buildings within the said parishes, any or either of them, which shall be so quitted as aforesaid, according to the last assessments thereof to the 25th day of March then last, or annual sums of money equal to the loss in tithes or sums of money or customary payments in lieu of tithes, which said rectors and impropriators, their respective successors, heirs, or assigns might sustain by the want of occupiers in or by the taking down of such houses or other buildings respectively, estimated as aforesaid, shall be paid and payable to the said several rectors and impropriators, their respective successors, heirs, and assigns, out of the monies to be applied for the purposes of the said Acts, clear of all taxes and deductions, on [certain days therein mentioned], the first payment to be made on such of the said days as should first and next happen after the occupier or occupiers of any such houses or other buildings in said parishes, any or either of them, shall have quitted the same as aforesaid; and such sum and sums of money to be paid and made good shall diminish in proportion to the tithes or yearly sums of money, by way or in lieu of tithes, which shall, for the time being, be actually payable for new houses or other buildings erected, completed, and occupied on ground which shall be so cleared within the said parishes, any or either of them, as aforesaid."

(*a*) Appointed her Majesty's Solicitor-General, 26th of March, 1851.

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sions of stat. 2 & 3 Vict. c. xcv. intituled "An Act for extending the line of Railway between London and Blackwall, called the Commercial Railway; and for amending the Acts relating thereto." By that statute, a Company, which had been incorporated by the 6 & 7 Will. 4, c. cxxiii. was authorised to construct a railway from certain parts of the city of London to Blackwall. In the 33rd section of the stat. 2 & 3 Vict. c. xcv. a provision was contained for indemnifying the clergy in the parishes in the city of London, through which the intended railway was proposed to pass, for the loss of the money payments in lieu of tithes, which they would sustain by the removal of buildings by the Railway Company.

Two questions arose for decision in the suit, the one, whether the rector was entitled to a decree for the payment of 2*s.* 9*d.* in the pound upon the annual value or rent of the premises which the Company had removed under the authority of the Railway Act, during the period the ground remained vacant, and therefore not liable to assessment in respect of tithes; or whether the rector's right during the period before mentioned was limited to a payment according to the rate which had been paid for the quarter ending Lady-day, 1839, by the occupiers of the premises which had been removed.

Secondly, whether the liability of the Company in respect of the premises which had been removed was continued until any newly erected or substituted premises should become productive to the rector, or only for the time during which the ground from which the premises had been removed and the newly substituted premises should not be liable to assessment.

Upon the first point, the decree of the Vice-Chancellor in all cases, where there had been no agreement between the rector and the occupier relative to the rate to be imposed or to the rent or value of the premises, subjected the Company to a liability after the same rate as the occupiers of

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the removed premises had paid during the quarter ending Lady-day, 1839; but where the payment up to Lady-day, 1839, had been regulated by agreement between the rector and the occupier, the decree directed, that the Company should be charged by a rate of 2*s.* 9*d.* in the pound upon the actual value or rent of the premises.

Upon the second point, the decree directed the Company to be charged after the rate before mentioned, subject to a credit or deduction of so much money as the rector should actually have received in respect of any newly erected premises.

Against this decree the Company appealed; and the questions to be decided by your Lordships depend upon the construction of the 33rd sect. of 2 & 3 Vict. c. xcv.

Among the parishes through which the defendants were authorised to construct their Railway was the parish of St. Olave Hart-street; and for that purpose they were authorised to remove such buildings as should be necessary. The removal of those buildings would naturally diminish the income of the rectors of the several parishes, and therefore the 33rd section of the statute was enacted, to indemnify them in respect of such diminution.

[His Lordship here read the section (*a*), and proceeded:]

Before submitting to your Lordships what seems to me to be the correct construction of that section, it may be convenient that I should state the facts to which that construction is to be applied.

Your Lordships are aware, that, in the city of London, the incumbents of several parishes, by virtue of a decree made under the authority of an Act of Parliament, are entitled, in lieu of tithes, to a money payment after the rate of 2*s.* 9*d.* in the pound upon the houses and buildings within their respective parishes. The decree is dated the 24th of February, 1545, in the 37th year of the reign of King Henry the 8th.

(*a*) Ante, p. 688.

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In the course of various judicial proceedings it has appeared, that the decree was very partially acted upon until within a recent period. The payments up to that time were made according to agreement between the occupiers and incumbents of their respective parishes, fluctuating between 6*d.* and 1*s.* in the pound upon stipulated amounts.

Your Lordships may also, perhaps, be aware, that no questions come before Courts of justice upon which such uncertain and contradictory evidence is given, as upon the value of houses in the city of London. When the proposed indemnity was to be provided for, it was therefore to be expected that the parties interested would be desirous of adopting some rule or test by which a proper amount of indemnity could be ascertained or regulated, without resorting to any disputable and possibly litigious course of ascertaining in each instance upon what amount and after what rule the compensation should be assessed.

In the parish of St. Olave Hart-street, the money-payments in lieu of tithes during the incumbency of the former rector had been regulated by agreement. The present rector continued to collect after the same rate as his predecessor had done, until a change took place in the occupation; and upon such a change he came to an agreement with the new occupier as to the amount upon which the assessment should be made, and then took 2*s.* in the pound upon the agreed sum, except where the occupation was by a public company, and of such companies he claimed the full 2*s.* 9*d.* upon the agreed rent.

In considering what is the correct construction of the section in question, the object of the enactment should be borne in mind; and that object was to give indemnity, and indemnity only, to the incumbents of the different parishes; and that purpose would be accomplished by the Company's paying to the clergy just so much as the clergy would have

received if the Railway Company had never interfered with the premises which they in fact did remove.

It may also be observed, from the class of buildings in the part of the parish through which the Railway was proposed to pass, that any new buildings which should be erected by the Company would be of a superior description and of a much higher annual value than the buildings which were to be removed; and the permanent effect of the execution of the Company's works would be materially to increase the income of the clergyman. It was, however, certain, that, after the then existing buildings should be removed, there would be an interval during which there would be an interruption in or suspension of such income.

There can be no doubt that the section in question was intended to embody and express an agreement come to amongst the parties, and sanctioned by Parliament and the bishops; and the substance of that agreement seems to be, that, after the occupier of the premises to be removed should have quitted possession, the yearly sums of money in lieu of tithes, payable in respect of such premises according to the last assessment thereof to the 25th of March, 1839, equal to the loss which the clergy might sustain by the want of the occupiers, estimated as aforesaid, should be paid to the clergy by the Company at the times therein mentioned. The language thus used primâ facie imports that the sums for which the clergy were entitled to be indemnified were those sums which, according to the assessment to the 25th of March, 1839 (the last quarter of the previous tithe year), would have been receivable by them during the interval of the removal of the old buildings and the construction of the new buildings, which would be liable to tithes. Plain however as these words appear to be, the whole dispute is as to their meaning.

It occurs to me, that proof that certain sums had been

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demanded by the clergy and paid by the occupiers, would, within the meaning of the Act, have exclusively proved what had been the assessment of the occupiers so paying to the 25th of March, 1839; and upon these facts there does not appear to have been any dispute or uncertainty; but the question raised is, what was meant by the word "assessment" in the sentence which expresses, that yearly sums of money, payable according to the last assessment thereof to the 25th of March, 1839, equal to the loss which the clergy might sustain by the want of occupiers of the buildings taken down, estimated as aforesaid, should be paid by the Company. The respondent, the rector, has claimed to be entitled to be paid 2*s.* 9*d.* in the pound upon the alleged annual value of all the premises removed by the Company during the period of the ground being unoccupied. The Company, on the other hand, contend that they are liable only to pay such sums as the occupiers of the premises removed would have paid during the interval referred to according to the assessment of the 25th of March, 1839, if their occupation had not ceased. The decree appealed against decided, as I have before stated, that in all cases where it could be proved that the amount of rent had been agreed upon, the rector was entitled to receive 2*s.* 9*d.* in the pound assessed upon such agreed rent or value; but that in respect of other premises, where no agreement could be proved as to the rent or value, the Company were liable to pay only after the rate which had been paid to the 25th of March, 1839.

I cannot advise your Lordships to adopt that conclusion. The Vice-Chancellor held, that the word "assessment" did not refer to the assessment for the poor-rate; in which, I think, he was clearly right. The amount of rent attached to any premises liable to be rated to the poor did not constitute the assessment; and that assessment, it is quite clear, could not form the basis of compensation for loss of tithes.

The learned Judge's course of reasoning appears to have been, that when a sum was paid in respect of tithes to the 25th of March, 1839, without proof of any prior agreement, the amount so paid ought to be taken as the assessment referred to in the Act of Parliament, although that sum was less than 2*s.* 9*d.* in the pound upon the admitted amount of the rent or value; but where there had been any agreement as to the rent or value, and the rector had taken 2*s.* in the pound upon that amount, he (the Vice-Chancellor) should not hold payment after such rate to be proof of an assessment, but should hold the receipt of 2*s.* in the pound by the rector, instead of 2*s.* 9*d.*, to be merely a voluntary remission or reduction, and that the amount of the rent being agreed, the law made the assessment at 2*s.* 9*d.*

The reasoning for this conclusion seems to me vague and unsatisfactory, and the conclusion wrong. The parties must have acted upon the assumption, when the Act passed, in the summer of 1839, that there had in fact been some arrangement throughout the parish by which the amount of tithes to be paid to the 25th of March preceding had been understood, agreed, and settled; and such arrangement by consent was denominated an assessment; and as it would be proved by actual payment, it constituted a definite and certain test, excluding the necessity of inquiring as to the value of the premises, the amount agreed to be received, or any other fact than the actual payment and receipt. But, according to the argument of the respondent, when the Act passed, he agreed to be compensated by an assessment to the 25th of March, 1839, when he knew no such assessment had been made. The Company could not object to being bound to pay compensation for loss arising from the removal of occupiers after the rate which those occupiers had actually paid during their occupation; but if the rector had insisted that that was not a just rate of compensation, because those payments had been reduced by indulgence and consent below what he was entitled by

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law to receive, I have no doubt that some distinct enactment would have been adopted to preclude the possibility of dispute as to the rent or value of every house in the parish. The fact was apparent, that the rector had, to the 25th of March, 1839, never received 2*s.* 9*d.* in the pound from any of the occupiers, except corporations and public companies; and there was reason to believe, that he would have received after that rate during the period for which compensation was to be made, if the occupation had remained undisturbed by the Company; and as I infer from the terms of the statute that it was the object of the legislature to give indemnity to the clergy and no more, a construction of the section which would subject the Company to the payment of a greater amount than the rector would have received if the Company had never existed, does not appear to me to be consistent with that purpose.

In order to carry the intention into effect, the measure of indemnity refers to a test which seems well adapted to the purpose, the test being the rate and computation which had been adopted by the rector and the tithe-payer previous to the establishment of the Company, and which there was no reason to suppose would have varied during the interval for which compensation would have to be computed. The Act has denominated that test and computation the "assessment;" and the question is, whether anything existed, to which the word "assessment" can be properly referred. I think there did, and that the amount claimed by the rector and paid by the occupiers, to the 25th of March, 1839, constituted the "assessment" intended by the Act. Compensation, according to that test, would, I think, not only be a just rule, but the only just rule, and was, at the same time, the best calculated to accomplish that object which all the parties, when before Parliament, would propose to desire, viz. to exclude uncertainty and litigation; and for these reasons the decree, I think, is not warranted by the statute, and gives to the rector

more than indemnity, as it gives 2*s.* 9*d.* in the pound, when, if the Company had not existed, it is clear that the rector would only have received 2*s.* in the pound; and it gives 2*s.* 9*d.* in the pound upon amounts larger than the rate would have been calculated upon if the occupation had continued undisturbed.

Having come to the conclusion that the learned Vice-Chancellor has not put a correct construction upon the section in question, I recommend your Lordships to reverse the decree founded upon such erroneous construction; and that the cause be remitted, with a direction in conformity with the construction of the statute which I have presumed to submit to the House.

The decree appears to be erroneous also in this respect: the Company was to continue liable to indemnify the rector in respect of the buildings removed by them, until other buildings upon the same site should be constructed and become liable for tithe-rent, when the liability of the Company was to cease in proportion to the sums which would become payable to the rector by the construction of such new buildings.

The decree directs the amount payable by the Company to be credited only with the sums actually received by the rector in respect of such newly-constructed buildings, and does not direct, as it ought to have done, that the Company should be credited with the sums which have become payable in respect of such premises. I think the decree should be reversed in this respect; and while the Company should be charged for the interval during which compensation is payable, according to the payments by the respective occupiers to the 25th of March, 1839, credit should be allowed to the Company for such tithe-rent as should have become payable in respect of the new buildings.

Mr. *Speed* asked for the costs which had been incurred in

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the Master's office subsequently to the decree of February, 1847, on the ground that they had been caused by the appellant's delay in presenting the petition of appeal.

The *Solicitor-General* proposed, that no order should be made as to those costs; but that, in remitting the cause to the Court below, it should be made a part of the decree, to direct that these costs should be reserved, which would have the effect of bringing it within the discretion of the Court.

The House was of this opinion.

Decree reversed.—Cause remitted accordingly.

BEFORE VICE-CHANCELLOR LORD CRANWORTH.

Jan. 21*st &* 25*th.*

WEBSTER *v.* THE SOUTH EASTERN RAILWAY COMPANY.

A Railway Company, under the powers of their Act, purchased land of A. and also of B. The Company, after the period when their powers for taking land compulsorily had ceased, entered into possession, and commenced felling timber on a piece of land which they supposed they had purchased from B.; whereupon A. claimed to be tenant for life, and gave notice of such claim to the Company, who refused to entertain it. A. then filed his bill, praying an injunction to restrain the Company from continuing in possession or committing waste. The affidavits on both sides being inconclusive as to the title, the Court refused to interfere by injunction, but left the plaintiff to his remedy at law.

THE bill, which was filed on the 20th of December, 1850, prayed, that the above-mentioned Railway Company, their agents, contractors, and workmen, might be restrained by injunction from keeping possession of or entering or continuing in or upon a piece of land in the bill particularly mentioned, or digging, using, or interfering with the same, and from committing any waste thereon.

This was a motion for an injunction in the terms of the prayer of the bill.

The facts, as stated by the affidavits in support of the motion, were as follows:—

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On the 18th of June, 1846, the South Eastern Railway Company obtained an Act of Parliament authorising them to make a railway from Tunbridge Wells to join the Rye and Ashford Extension Railway, near Hastings; and thereby it was enacted, that the provisions of the Lands and Railways Clauses Consolidation Acts should be incorporated therewith; and also that the powers of the Company for the compulsory purchase of lands for the purposes of the Act should not be exercised after the expiration of three years from the passing thereof.

The Company requiring certain land belonging to the plaintiff, who was then abroad, caused the usual notices to be served at his mansion Battel Abbey, then occupied by his mother, who was also his guardian, and caused a valuation to be made, which included the compensation to be paid for severance and consequential damage.

The plaintiff alleged, that neither the notices nor the valuation included a piece of land containing about one-fourth of an acre, of which the plaintiff by affidavit stated that he had become seised, or to which he was otherwise entitled for life.

The plaintiff protested against this valuation, and afterwards gave notice, pursuant to the 64th section of the Lands Clauses Consolidation Act (*a*), of his desire to have the valuation submitted to arbitration.

On the 13th of December, 1850, the Railway Company, without the license, consent, or knowledge of the plaintiff, took possession of the said piece of land, and commenced felling timber thereon, having never, as was alleged, given to or served on the plaintiff any notice whatever in relation thereto.

The powers of the Company to take land compulsorily expired on the 18th of June, 1849.

(*a*) This section provides, that, when compensation to an absent party has been determined by a surveyor, the party may have the same submitted to arbitration.

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The affidavits of the defendants went to shew, that the piece of land, of which the plaintiff claimed to be tenant for life, formed part of certain glebe land called "The Pound-field," described in the books of reference in the following manner:—"Sir G. V. Webster, Bart., patron; Rev. J. Littler, incumbent, owner or reputed owner; Frederick Ellman, lessee; Spencer Soan, occupier.

That the Company, on the 1st of May, 1849, served notice on the plaintiff, by leaving it at his residence, (he being abroad), and also other notices on the incumbent, the lessee, and the occupier, of their intention to take part of the Pound-field, including the piece of land claimed by the plaintiff.

That, on the title of the incumbent being investigated, it was found that he was the absolute owner of the piece of land in question, and that the plaintiff had no interest therein.

It was further stated, that the Company had settled the price to be paid for the piece of land both with the incumbent and the lessee; and that they had treated the former throughout as the owner; and that he, on his part, had never admitted the ownership or interest of the plaintiff.

Mr. *Malins* and Mr. *Schomberg*, in support of the motion, contended that the Company had no color of right for entering upon the lands of the plaintiff, they never having given the required notices or exercised the powers of taking land compulsorily within the time specified by their Act.

That the notice given on the 1st of May, 1849, was only given to the plaintiff as patron of the living, and not in his capacity of owner. That, if the notice were a good notice, it did not establish the relation of vendor and purchaser, so that the Company could now proceed adversely as against the plaintiff: *Brocklebank* v. *The Whitehaven Railway Company* (*a*), *Kinnersly* v. *The North Staffordshire*

(*a*) Ante, Vol. 5, p. 373.

Railway Company (*a*). That the plaintiff, being tenant for life of the land in question, the only ways by which the Company could ascertain the value were by a jury or arbitration. That all the powers incident to the compulsory taking of land had ceased, and consequently the Company could no longer avail themselves of the means given by the Act for summoning a jury or appointing arbitrators; and that it was now impossible for the Company to proceed without the plaintiff's consent.

Mr. *Bethell*, Mr. *R. Palmer*, and Mr. *Baily*, contrà, contended, that this was a case of disputed title. That the Company had obtained a conveyance, and were, as they supposed, the legal owners of the land. That a demurrer to a bill filed for the same purpose as the present, and in which the facts were very similar, had been allowed: *Davenport* v. *Davenport* (*b*). That a party claiming adversely to the Company must establish his right at law before this Court would interfere by injunction: *The London and North Western Railway Company* v. *Smith* (*c*). That the 124th section of the Lands Clauses Consolidation Act provided for cases in which Companies had omitted by mistake to purchase lands; and the Company had the right to purchase the plaintiff's interest in the land at any time within six months after the right should have been established at law, notwithstanding their power for taking land compulsorily had ceased. That the ownership of the land in question was clearly a matter of dispute, and must be tried under the 124th section. That no deeds had been produced or title shewn by the plaintiff to the land in question; and it was sworn by affidavit that he had not received rent in respect of it.

Mr. *Malins* replied, and, in support of the plaintiff's

(*a*) Ante, p. 662. (*b*) 7 Hare, 217. (*c*) Ante, Vol. 5, p. 716.

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right to an injunction, cited *Barker* v. *The North Staffordshire Railway Company* (*a*).

The VICE-CHANCELLOR, at the conclusion of the argument, said—I cannot decide this case without looking at the affidavits and at the cases which have been cited. The authorities appear to go to this extent, and to this extent only,—that in the same manner as the Court will prevent individuals from cutting down timber or committing any other kind of waste on an estate which they have contracted to purchase, until the contract is completed, so it will restrain Companies from doing anything to the detriment of parties by virtue of the statutory powers given to them, until those powers have been duly complied with. But this is a case of a very different nature: the Company, either rightly or wrongly, supposed they were dealing with the rightful owner of the piece of land in question, when they were dealing with the Dean of Battel; and in that belief they paid the purchase-money into Court to his credit; and what they contend against the plaintiff is, that they have rightful possession of the piece of land under their contract with the Dean. The plaintiff meets that by shewing, or attempting to shew, that he is in truth the owner of the piece of land.

It seems to me to be very doubtful whether that is a matter the Court can enter into; and my doubts are raised by the very vague and loose evidence of Mr. T. and Mr. S. These gentlemen state matters which, when coupled with other facts, might induce a jury, in an action of ejectment, to come to the conclusion that the plaintiff was the owner, or had been in possession of the piece of land; but supposing that to be so, how do I know that if the Company were to agree with the plaintiff for the purchase of the piece of land, some one else may not start up and say that he is the owner.

(*a*) Ante. Vol. 5, p. 401.

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I can understand the principle on which the Court prevents Companies—powerful bodies as they are—from acting by virtue of the powers given to them by Parliament, until they have done what their Acts of Parliament require; but in this case the Company were not availing themselves of their Parliamentary powers; they have obtained possession of the land, not from the plaintiff, but from the Dean of Battel, and are in possession of it; and in such a case it does not appear to me that there is any principle upon which the Court can interfere more against a Company than it would against an individual. This is the case of a Company claiming by an adverse title, not under the Act of Parliament, and saying there is no privity between them and the plaintiff in respect of this piece of land. I will not, however, finally dispose of the case until I have read the affidavits and looked at the authorities.

June 25th.

The VICE-CHANCELLOR, (after reading the notice of motion, and referring to the bill and affidavits, delivered his judgment as follows):—The bill asks no relief except the injunction; and I am of opinion that it makes no case whatever for the relief that it does ask, and for this reason: the Company here claim nothing whatever from the plaintiff under the powers of the Act of Parliament, so far as this piece of land is concerned, but they claim adversely by title.

In the map or plan and book of reference, deposited with the clerk of the peace for the county of Sussex, the piece of land in question was described as being church property, that is, part of the glebe belonging to the deanery of Battel; and the Company, by their affidavits in answer, set up this case, that they, believing this piece of land to be—as they still believe it to be—the land of the Dean, served him with notice to treat for the purchase of it, and that they have paid the purchase-money into Court; and they claim it, not from the plaintiff under any of the

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powers of the Act, but against him; saying, that they have derived title to it not from him but from a third person. I have looked through the cases, as far as I have been able, and I find no authority for saying, that, in such case, this Court will interfere against a Railway Company any more than it will against an individual. The cases in which the Court interferes are those in which the persons seeking relief are persons whom the Company are seeking to dispossess under the powers of their Act, and in which the Court has said, that it will hold the Company strictly to shew that they are duly complying with the powers given them by their Act. That was the case of *Brocklebank* v. *The Whitehaven Junction Railway Company* (*a*). There the powers of the Act terminated on a certain day; and just previously to that day, the jury were assembled to assess the value of a yard belonging to the plaintiff, which the Company were authorised to take under the powers of their Act; but the verdict was not returned until after the expiration of those powers. If the late Vice-Chancellor of *England* was right, in thinking that the verdict was a nullity, because it was not returned until after the powers of the Act had terminated, then his conclusion was quite right, that the Company ought not to be allowed to proceed to obtain possession of the yard under a pretended authority of an Act of Parliament, which they did not possess. Lord *Cottenham*, on appeal, doubted whether the conclusion at which the Vice-Chancellor had arrived upon the provisions of the Act was correct; and he directed a case to be sent for the opinion of a Court of law; but if his Lordship had not entertained that doubt, he would have adopted the same course as the Vice-Chancellor had done.

The case of *Barker* v. *The North Staffordshire Railway Company* (*b*) is resolvable into the same principle. There

(*a*) Ante, Vol. 5, p. 373. (*b*) Ante, Vol. 5, p. 401.

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the Company had given notice of their intention to take ten pieces of land; but, in the progress of their works, they found, or they thought they should find, that they required only eight: and they proceeded to pay the money for, and to take possession of, the eight: but Vice-Chancellor *Knight Bruce* held, that they could not take the land piecemeal; they must take the ten acres, and pay for them; and in that respect Lord *Cottenham* was exactly of the same opinion with the Vice-Chancellor. The principle on which the Court interfered was, that the Company were bound to adhere strictly to the terms of the contract, which they had forced upon the plaintiffs under their Parliamentary powers; but how does that apply to a case like the present, where the Railway Company claim nothing whatever from Sir George Webster, but claim adversely to him?

The Company, it is true, claim other land from him; and with regard to that, there is a dispute pending between them; but it is part of Sir G. Webster's case to say, that the piece of land in question forms no part of that which is the subject of the dispute. I cannot, therefore, but feel, not only that this case does not come within the principle of the cases to which I have adverted; but that, in granting an injunction in such a case as this, I might, instead of preventing, be doing, perhaps, irreparable mischief; for if, after the Railway Company have given notice to a person whom they have considered to be the owner of the piece of land, and have treated with him, and purchased the land from him, the Court were to interfere and stop the Railway *brevi manu* at the instance of a third person, who applies to it at the last moment, and says, vaguely, that he was at a former time seised of or otherwise entitled to it, the Court would be very likely to find itself instrumental in doing injury, by putting an improper pressure on the Railway Company for the advantage of that third

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person, in compelling the Company to come to terms with him, however unreasonable those terms might be.

This bill, I must observe, contains a vast deal of statement, the greater part of which might be struck out as having not the smallest reference to the matter in question. The bill begins with stating the title of the plaintiff; and if everything else were left out of it until you come nearly to the end, you would have everything on which the equity, if it may be so called, is founded, namely, that though the plaintiff was seised of or entitled to the piece of land, the Railway Company had entered upon it, and began to use it for the purpose of their Railway, without getting a title from him. There is no allegation that an ejectment or an action of trespass will not give the plaintiff all the relief that he is entitled to. He merely says, that the Railway Company are proceeding to assert their title to the land which he thinks he is entitled to.

My view of the case renders it unnecessary for me to discuss the question on which side the balance of testimony inclines, as to who is the owner of the land. The plaintiff has stated some facts, which, if he were trying an ejectment for this piece of land, might, either alone or with some other evidence, warrant the jury in saying that he is the owner. On the other hand, he is met by evidence on the part of the Company, which, upon such a trial, might lead to the conclusion that he is not the owner. The case is one of very minute circumstances, leaving it exceedingly doubtful with whom the real truth and justice of the case, as to the title, rests. On the part of the Company, it is to be observed, that this small piece of land forms to the eye part of a large close of thirteen acres, called the Pound Close, which certainly belongs not to the plaintiff but to the Dean of Battel. However, this is not conclusive. It may be, though the close is all to the eye one close, yet that a corner—a quarter of an acre of it—may

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not belong to the owner of the rest of the field. Nevertheless, everybody must feel that, on the trial of an ejectment, it would be a strong circumstance in favour of the Company, that the close is unsevered by metes or bounds, and that about 51 out of 52 parts do not belong to the plaintiff. His Lordship then commented upon certain of the affidavits, which, he said, were very loosely and vaguely worded, and then proceeded as follows:—

If the plaintiff had been able to shew that he had ever received rent for this piece of land, no doubt he would have done so; but he is quite silent upon that important point. I view the evidence on the one side and on the other as equivalent; but I do not rely on that. In my opinion, where there is a mere dry question of adverse title, a bill filed on that ground, without more, entitles the plaintiff to no relief whatever. If I were to come to a contrary conclusion, and were to hold that the plaintiff is entitled to the relief which he asks, and the Railway Company were to compromise with him, as it is likely they would do, what is there to prevent some other person from filing another bill, shewing plausible grounds of title, and stating that he is entitled to this land; the consequence of which would be, that the Company would be stopped again.

This is a mere case of adverse title, claimed by the plaintiff upon very slight evidence indeed, and without alleging that an action of ejectment or an action of trespass will not give him all the remedy he can possibly be entitled to or wish for. And my opinion is, that I should be extending the jurisdiction further than any case warrants, or any regard to convenience requires, if I were to grant this motion; and therefore I shall refuse it with costs.

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IN THE HOUSE OF LORDS.

July 8th.
August 8th.

Re THE DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY;

HUTTON *v.* THOMPSON.

AND

Re THE WOLVERHAMPTON, CHESTER, AND BIRKENHEAD JUNCTION RAILWAY COMPANY;

NORRIS *v.* COOPER.

(WINDING-UP ACTS, 1848 & 1849).

A. applied by letter for shares in a provisionally registered Railway Company, and received a letter of allotment of certain shares, on which he was required to pay the deposit; and the letter, with the banking receipt appended thereto, was to be exchanged for scrip upon A.'s executing the Parliamentary contract and subscribers' agreement. A. paid the deposit, but did not execute any deed. The scheme having been abandoned, and an order made for winding-up the Company, the Master, in settling the list of contributories, placed A.'s name upon the list, but the Vice-Chancellor on appeal ordered it to be removed.

Held, by the House of Lords, affirming the decision of the Vice-Chancellor, that A.'s name had been properly removed from the list of contributories. That A. had not subjected himself to any other obligation or responsibility than to take certain shares in the proposed Company in the event of its being in fact established, which it never was. That the stat. 7 & 8 Vict. c. 110, did not alter the existing law so as to render an allottee of shares liable beyond what his own contract had done.

THE learned Judges were summoned to attend at the hearing of these two appeals, which, as involving the same question, were directed by the House to be heard together (*a*).

The appellants were the official managers of two provisionally registered Railway Companies, directed by the Court of Chancery to be wound up; and the appeals were brought to discharge two orders of Vice-Chancellor Lord *Cranworth*, dated respectively the 11th of March and the 24th of June, 1851: the former removing the name of the respondent Thompson from the list of contributories of the Direct Birmingham, Oxford, Reading, and Brighton Rail-

(*a*) The Peers present were—The Lord Chancellor, and the Lords *Brougham*, *Cranworth*, and *Redesdale;* the Judges present were—The Lord Chief Baron, and Barons *Parke*, *Alderson*, and *Platt;* and the Justices *Patteson*, *Maule*, *Wightman*, *Erle*, *Williams* and *Talfourd*.

way Company; and the latter order removing the name of the respondent Cooper from the list of contributories of the Wolverhampton, Chester, and Birkenhead Junction Railway Company.

The Lord Chancellor intimated to the counsel who appeared to argue the case, that the House had determined to hear Thompson's case first, on the ground that the facts being stronger in favour of the appellant in that case than in Cooper's, it would, if decided against him, govern the latter case.

The respondent Thompson's case differed in substance from Cooper's case in the wording of the letter of allotment; and it also appeared that the respondent Thompson had accepted the allotment of shares, and paid the deposit, which the other respondent had not done. The facts were as follow:—

In 1845, a Company was formed for the purpose of constructing a Railway from Birmingham to Oxford, and thence to Reading and Brighton. The Company was duly provisionally registered by the name of "The Direct Birmingham, Oxford, and Brighton Railway Company." Prospectuses were issued, giving a form of application for shares in the following words:—

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Gentlemen,—I hereby request that you will allot me twenty shares of 25*l.* each in the above proposed Railway; and I hereby undertake to pay the deposit thereon, or on any less number of shares which may be allotted to me, and to execute the Parliamentary contract and subscribers' agreement, when required to do so."

The respondent Thompson applied for shares in the printed form; in answer to which application he received a letter of allotment, in the following form:—

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"Letter of Allotment. Not transferable.

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Capital, 2,000,000*l.*, in 80,000 shares of 25*l.* each.
Deposit, 2*l.* 12*s.* 6*d.*

"No. of Letter, 8. No. of Shares, 20.

"46, Moorgate-street, London, 18th of October, 1845.

"Sir,—The committee of management have allotted to you twenty shares in this undertaking; and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 52*l.* 10*s.*, into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void.

"This letter, with the bankers' receipt appended thereto, will be exchanged for scrip upon your presenting it at the offices of the Company, and executing the Parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th of October; and notice will be given when the deeds will be sent into the country. "I am, Sir, your obedient servant,

"J. B. RAYNER, Secretary."

"To Henry Thomas Thompson, Esq."

The respondent duly paid the deposit of 2*l.* 12*s.* 6*d.* per share on the said shares to the bankers of the Company; 70,000 shares were allotted, but the deposits were paid on 4,295 only, and the undertaking was consequently abandoned.

The committee of management, collectively and individually, paid large sums of money on account of debts properly contracted by them in discharge of their duties in the due prosecution of the undertaking, and other debts of the Company were still remaining due and unpaid.

On the 21st of December, 1849, an order was made by the Vice-Chancellor of *England*, on the petition of S. T.

Jones, whereby it was ordered that the said Direct Birmingham, Oxford, Reading, and Brighton Railway Company should be dissolved and wound up.

Mr W. Brougham, the Master in rotation, to whom the winding-up of the Company was referred, on the 28th of January, 1850, appointed the appellant official manager of the Company, who made out and delivered to the Master a list of the contributories of the Company; and in such list he included the name of the respondent H. T. Thompson as a contributory, and as an "allottee of shares," who had paid his deposit in respect of twenty shares.

On the 24th of June, 1850, the Master made his certificate, whereby, after certifying amongst other things the production of the certificate of provisional registration of the Company, and certain returns of change of the name of the Company, and a copy of the Prospectus, the Minute-book, the Allotment-book, the Cash and Bankers' books, a form of letter of application for shares, admitted to be the form used by the respondent, and a letter of allotment of twenty shares, he certified as follows:—"The said H. T. Thompson admitting before me the payment of 52*l.* 10*s.*, being the deposit on the said twenty shares according to the said letter of allotment, I have this day included the said H. T. Thompson in the said list as a contributory in respect of twenty shares of 25*l.* each."

From this decision the respondent appealed; and on the 11th of March, 1851, the Vice-Chancellor Lord *Cranworth* made an order reversing the Master's decision, and ordering that the name of the respondent be excluded from the list of contributories of the Company.

The reason of the present appeal from that order was, that "the said H. T. Thompson, according to the true construction of the Winding-up Acts, 1848 and 1849, is a contributory of the said Company within the true intent and meaning of the said Acts, or one of them."

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The facts of the respondent Cooper's case were as follow:—

In the year 1845 a Company was projected for making a Railway between Birmingham and Birkenhead by the nearest route, with a capital of 1,000,000*l.*, by the creation of 50,000 shares of 20*l.* each.

Prospectuses were issued and circulated containing the names of the Provisional Committee and other officers of the Company, and detailing the nature and objects thereof, the number of shares, and the amount of each share, and giving a form of application for shares by persons desirous of becoming members of the Company. The Company was provisionally registered pursuant to the 7 & 8 Vict. c. 110, by the name of The Wolverhampton, Chester, and Birkenhead Railway Company.

On the 15th of October, 1845, the respondent Cooper made an application for an allotment of twenty shares in the form given in the prospectus, which was, *mutatis mutandis*, the same as in the former case; to which application he received the following answer:—

"Allotment. No.

"Birmingham, 1st November, 1845.

"Sir,—I am directed to inform you, that the committee of management have, in compliance with your application, allotted you twenty shares in this undertaking; and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of 42*l.*, must be paid to one of the under-mentioned bankers on or before Saturday the 8th of November, who, upon the receipt thereof, will sign the voucher at the foot of this letter.

"This letter with the bankers' receipt must be exchanged for scrip certificates, which will be granted upon your executing the subscribers' agreement and Parliamentary contract, without which no person will be recognised

as a subscriber, or be entitled to any interest in the undertaking. "Signed, &c."

The respondent Cooper did not pay his deposit, or sign the Parliamentary contract or the subscribers' agreement. Plans and sections, with books of reference, were prepared, and, in conformity with the Standing Orders of Parliament, were deposited at the offices of the Board of Trade, and with the clerks of the peace of the several counties through which the said proposed Railway was intended to pass. A Parliamentary contract and subscribers' agreement were prepared and engrossed; but neither of them was executed by any party, and the same were afterwards cancelled, in order to obtain a return of the stamp duty. The expenses of obtaining the said plans, sections, and books of reference, together with the charges of the several agents and others employed upon the business of the Company, amounted to a sum exceeding 12,000*l.* Several persons were called on to contribute; and, amongst others, S. Haines and T. Upfill paid upwards of 500*l.* towards the expenses of attempting to carry into effect the objects of the Company. R. Wrightson and T. Harris each paid 480*l.*; and E. Cooper likewise paid upwards of 420*l.* towards the same object. The said S. Haines, T. Upfill, R. Wrightson, T. Harris, and E. Cooper were each also respectively sued for debts owing by the Company, and an action was then pending against E. Cooper at the suit of W. S. Vardy, one of the solicitors of the Company.

The Company ceased to carry on business on the 5th of January, 1846; and on the 26th of October, 1849, the said S. Haines, T. Upfill, R. Wrightson, and E. Cooper preferred their petition to the Lord Chancellor, praying that the Company might be dissolved and wound up under the provisions of the Joint-stock Companies Winding-up Acts, 1848 and 1849; and that it might be referred to one of

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the Masters of the Court to wind up the affairs of the Company under the said Acts.

The petition was heard on the 3rd of November, 1849, before the Vice-Chancellor of *England;* when it was ordered, that the Company should be dissolved and wound up; and that it should be referred to the Master of the Court to whom it was referred to wind up the Trent Valley, Chester, and Holyhead Continuation Railway Company, to wind up the affairs of this Company. Mr. William Brougham was the Master to whom the matter was referred; and the appellant was appointed the official manager of the Company under the provisions of the said Acts. The Master, on the 23rd of June, 1851, made his certificate in the matter; and in his settlement of the list of contributories he included the name of the present respondent, W. Cooper, jun., in the character of an allottee, who had applied for and had had allotted to him twenty shares. The Master's certificate also admitted that he had thus included the respondent's name in the list of contributories, notwithstanding it had been proved to him that the required deposit of 2*l.* 2*s.* per share had not been paid, as required by the terms of the letter of allotment, nor had the respondent signed either the subscribers' agreement or Parliamentary contract, and that those documents had been regularly prepared, but that they had afterwards been abandoned and cancelled, for the purpose of obtaining the return of the stamp duty thereon.

The respondent having received an official intimation that his name had been placed upon the list of the "allottee contributories," on the 24th ult., appealed against the decision of the Master.

The appeal was heard before Vice-Chancellor Lord *Cranworth* on that day, when it was ordered, that the decision of the Master should be reversed; and that the name of the said W. Cooper, jun., should be expunged from the list of contributories of the Company as such allottee.

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It was announced by their Lordships, that, in consequence of the two cases involving the same principle, they should consider them as one case, and had determined to hear one counsel only for each appellant and respondent.

Mr. *Bethell* and Mr. *Roxburgh*, for the appellants.—In considering this case, it must be assumed that the present is an association or company within the operation of the Winding-up Acts of 11 & 12 Vict c. 45, and the 12 & 13 Vict. c. 108, for the order of the Vice-Chancellor, which brought it within the operation of those Acts, is still in force, and no motion is now before the House to discharge it. There is a great fallacy in comparing these associations to ordinary partnerships and companies—they are in fact associations with the view to the formation of a company, and have received certain powers, and authority to do certain acts, under the provisions of the Registration Act of 7 & 8 Vict. c. 110. This distinction must be always kept in mind; for it excludes the authority of those cases decided at common law, in which the facts were anterior to the passing of the Registration Act, and are not within its operation. Under the Act last referred to, these preliminary associations are made partnerships or companies for the purpose of obtaining the sanction of Parliament to a proposed scheme. They are composed of directors, provisional committee-men, and subscribers. Under it, they are empowered to use the name of the intended company, to cause surveys to be made, and to do that which must of necessity incur great expenses.

These Companies appear to have three stages of existence: First, that of provisional registration; secondly, complete registration; and thirdly, the matured state of incorporation by Act of Parliament: but, in its first state, it is a Company constituted of managing directors, of provisional committee-men, and shareholders; all of whom, when they

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have taken upon themselves their respective characters, are members of the Company, and assume the Parliamentary state or character of subscribers to the undertaking, and become liable to contribute to the expenses properly incurred. The 3rd, 4th, 7th, 9th, and 23rd sections, shew the constitution of the association; and the definition of a subscriber in the 3rd section shews, that the "members" include not only the promoters and provisional directors, but the subscribers. As soon as there are subscribers, the directors are authorised to proceed, and the amount of their contributions may be used and applied for the purposes of the partnership created by the operation of the statute. If there is a power to enlist subscribers to do certain acts, there is also a power to apply their contributions for the furthering of those acts, and all the necessary conditions of a partnership are at once brought into existence. Again, the letter of allotment is a complete contract; for not only do the allottees agree to take shares, but to execute the Parliamentary contract and subscribers' agreement; and these very contracts, when in strict conformity with the provisions of the Registration Act, 7 & 8 Vict. c. 110, in every case provide for the payment of certain expenses out of the deposit. If the definition of the word "contributory" be referred to, we shall find that, by the 3rd section of the Winding-up Act, 11 & 12 Vict. c. 45, it is declared, that it "shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof;" this is more extensive than the word "member," which, by the definition given in the same section, is declared to mean "any person entitled to a share of the assets or accruing profits of any such company," &c. But, independently of the statutory contract, there is also an equitable contract created, and there is a distinct personal engagement that the deposit shall be liable for the expenses. If the subscriber agrees to take shares, he im-

pliedly gives authority to incur expense in doing that which will produce the undertaking, and bring the perfect Company in which he is to have a share into existence. How else could it be set on foot? The Standing Orders of the Houses of Parliament require that plans and sections should be deposited, and a list of subscribers made out; a great expense is incurred by the preparation of these documents; every subscriber must be aware of the necessary outlay, and must be presumed to have sanctioned it. If a party agrees to take shares, and pays money for the accomplishment of his object, it must be considered that he has given authority to incur expense. The equitable effect of an imperfect contract is the same as the legal effect of a perfect one. By the agreement to execute the subscribers' contract, it must be supposed done, and, if done, then there is a clear authority to incur certain expenses; and if money be expended, then, by the definition of the Act, the party subscribing becomes a contributory. But, under the Act, a party is not merely a contributory to pay, he may also be a contributory to receive; he may be entitled to a share of the deposits not expended, which form the assets of the Company; and in winding up the affairs of the Company he cannot be excluded. It is impossible to reconcile some of the decisions on the cases in the Court below with the case of *Hutton* v. *Upfill* (*a*); for, although there are two elements in *Upfill's case*,—the consenting to act as one of the provisional committee, and the acceptance of shares; yet by the decision in *Norris* v. *Cottle* (*b*) the fact of a man being merely a member of the provisional committee is declared nothing; therefore, the acceptance of shares must be the ground on which that case was decided.

[Lord *Brougham*.—It has been objected, that my decision in *Hutton* v. *Upfill* (*a*) is erroneous in point of principle, because it is said, that as neither of the two facts which existed in that case would, taken separately, be

(*a*) Ante, p. 338. (*b*) Ante, p. 317.

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sufficient to create a liability, the two taken together cannot do so. But that argument is itself erroneous, as every day's practice in bankruptcy proves; for the act of buying will not alone make a man a trader, nor will the act of selling alone make him one, so as to bring him within the operation of the bankrupt laws; but the act of buying and the act of selling, taken together, will produce that effect.]

But there is also this distinction between the cases of *Norris* v. *Cottle* (*a*) and *Hutton* v. *Upfill* (*b*): in the former case, there was no contract whatever to take shares, and Cottle never in fact became a subscriber to the undertaking; but, in the latter case, Upfill had entered into an engagement to take shares, which would seem to be a sufficient ground for the decision in that case, and would also govern the present one. [The learned counsel then commented on *Lord Mansfield's case* (*c*), *Parbury's case* (*d*), and *Beresford's case* (*e*).] When the subscribers obtained scrip shares, they became owners of that which was legally saleable: *Young* v. *Smith* (*f*); and the sum deposited was the assets of the Company. The objects of the Winding-up Acts were, to dispose of those assets, and finally to arrange the affairs of the Company, not to settle the individual liability of each subscriber to his creditors.

It was further contended, that, however the decision might be with reference to the liability of the whole of the deposit to be applied to the expenses of the undertaking, there could be no doubt as to the 2*s.* per share authorised by the Act to be expended. That this point had never been brought before the Judges at common law in the case of *Ashpitel* v. *Sercombe* (*g*), but materially affected the liabilities of the promoters, if the entire deposit were declared to be inapplicable.

(*a*) Ante, p. 317.
(*b*) Ante, p. 338.
(*c*) 3 De G. & S. 58.
(*d*) Id. p. 43.
(*e*) 3 De G. & S. 175; *S. C.*, 2 Mac. & G. 197.
(*f*) Ante, Vol. 4, p. 135.
(*g*) Ante, p. 224.

Mr. *Cooper* (with whom was Mr. *Morris*) for the respondent Thompson.

The respondent, if liable at all, is liable in one of three ways, either under the statutes, by having become a partner, or by special contract. The two last may, in fact, be considered as involving one and the same principle.

As to the first point, it has never been contended in the Courts of common law, that the Registration or Winding-up Acts introduced new law, their only object was to facilitate the winding-up of abandoned schemes, and to terminate engagements, which it was hardly probable could be brought to a final arrangement, without such assistance from the legislature. The case of *Van Sandau* v. *Moore* (*a*), shewed the impossibility of winding up concerns of this nature in a Court of equity, and the new Winding-up Acts were intended to provide a remedy for an evil seen to exist in that case. The case of *Nockells* v. *Crosby* (*b*) must in fact decide the present one. *Bayley*, J., in that case, says, "On all projects, some expense must be incurred before many members join the concern; upon whom should that fall? Undoubtedly, if the scheme prove abortive, it should fall on the original projectors, and not upon those who advance their money on the faith of its going on."— In the present case, there was not any agreement or contract, and, consequently, no partnership was created; the directors were in the same position as the committee of a club, or the managing body of any botanical gardens or other society of a like nature: *Flemyng* v. *Hector* (*c*), *Todd* v. *Emly* (*d*). At common law, the subscriber may recover back his deposit: *Kempson* v. *Saunders* (*e*), *Walstab* v. *Spottiswoode* (*f*). The cases of *Tredwen* v. *Bourne* (*g*) and *Barnett* v. *Lambert* (*h*) are not decisions at all affecting the present respondent; for both those cases were decided

(*a*) 1 Russ. 441.
(*b*) 3 B. & C. 814.
(*c*) 2 M. & W. 172.
(*d*) 8 Id. 505.
(*e*) 4 Bing. 5.
(*f*) Ante, Vol. 4, p. 321.
(*g*) 6 M. & W. 461.
(*h*) Ante, Vol. 4, p. 308.

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on the particular facts, which, in the opinion of the Court, gave authority to pledge the defendant's credit. The same observation will apply to *Garwood* v. *Ede* (a), *Clements* v. *Todd* (b), *Jones* v. *Harrison* (c), and *Willey* v. *Parratt* (d). The cases of *Williams* v. *Pigott* (e) and *Wood* v. *The Duke of Argyll* (f) shew, that the whole question is, whether a defendant has or has not entered into any contract, by which he has given power to the managing body to pledge his credit. But the cases directly opposed to any liability on the part of the respondent at common law, are *Lefroy* v. *Gore* (g), *Wyld* v. *Hopkins* and *Reynell* v. *Lewis* (h), *Barker* v. *Stead* (i), *Baily* v. *Bracebridge* (k), *Ashpitel* v. *Sercombe* (l). The following cases shew that he is not a contributory according to the decisions of the Court of Chancery: *Ex parte Maudslay* (m), *Ex parte Mansfield* (n), *Ex parte Besley* (o), *Ex parte Roberts* (p), *Norris* v. *Cottle* (q).

Mr. *Rolt*, (with whom was Mr. *Rogers*), for the respondent Cooper.—I contend in the first place, that the respondent Cooper never had any shares allotted to him which he had agreed to accept; he applied for shares unconditionally, and his application was answered by a conditional allotment; he never took the shares or paid the deposits, or in any manner complied with the condition. If an offer of shares is made on a certain condition, and the condition is not complied with, it is the same thing as if the offer had been rejected; it is not necessary to decline it, for no better refusal to perform the condition can be given than not to

(a) Ante, Vol. 5, p. 134.
(b) Id., p. 132.
(c) Id., p. 138.
(d) 3 Exch. 211.
(e) 2 Exch. 201.
(f) 6 M. & G. 928.
(g) 1 Jo. & Lat. 571.
(h) Ante, Vol. 4, p. 351.
(i) 3 C. B. 946.
(k) 19 L. J., Q. B., 73.
(l) Ante, p. 224.
(m) Ante, p. 350.
(n) 3 De G. & S. 58; *S. C.*, 2 Mac. & G. 57.
(o) 2 Mac. & G. 176.
(p) Ante, p. 310.
(q) Ante, p. 317.

do the act required. If, however, the allotment and acceptance are considered complete, what is their effect? Before the Joint-Stock Companies Registration and Winding-up Acts, they would never have been considered as giving the managing body a power of spending the money of the subscribers; and does the passing of those Acts give any such authority? If a man agrees to take shares in a Company when formed, he does not agree to take shares in an association to form that Company. They are different contracts; and the argument that they are one and the same, has been rejected in every Court where contracts are expounded. It has been alleged, that, independently of the statutes, an equitable contract has been entered into between the promoters and the subscribers, which renders the latter liable; but this is not so. The contract, if contract at all, is, on the part of the subscriber, to be one of several thousand, but not to be one of a dozen men who are trying to form a Company. But to what extent does the supposed contract contended for by the other side go? It is not a contract to take a share with the body forming the promoters of the Company, but with the persons representing the full number of shares mentioned in the prospectus, and only an agreement to bear a proportionate share of the expenses with them. If the whole number of shares is to be 50,000, and the respondent has taken ten, he is only to bear ten of the 50,000th parts of the expenses. But the present proposition is to fix him with the payment and contribution of the whole amount of his shares, without reference to the number of shares into which the Company, when formed, is to be divided. The provisions of the Registration Act do not alter the law; the directors may require the payment of a sum of money by way of earnest, but no authority is given to them to spend it; and the 83rd section of the 11 & 12 Vict. c. 45, expressly gives power to the Master to make calls on contributories "so far only as such contributories respectively

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shall be liable at law or in equity to pay the same." Again, what expenses are the directors authorised to incur, and how are they to be borne? Suppose the registered promoters have taken no shares, are they to go free while the subscribers for shares are liable? How is the liability of the several parties to be estimated? The cases at common law negative any liability on the part of a shareholder. The case of *Barnett* v. *Lambert* (*a*) has been overruled by the later cases; and *Garwood* v. *Ede* (*b*) is no authority, for in that case the defendant had signed a deed agreeing to pay part of the expenses. [The Lord Chancellor referred to the case of *Woolmer* v. *Toby* (*c*).] The legal obligation is the sole test of liability. [It was also contended in argument, that these associations were not properly, and ought never to have been made, subject to the Winding-up Acts; but, as the decision does not affect this point, the argument is not introduced.]

Mr. *Bethell*, in reply.—My simple proposition is, that every allottee of shares in a provisionally registered Company becomes thereby a member of the association; and if the order be made for winding up the association, it is a Company of which such allottee is a member and must necessarily be a contributory under the Act. The other side have treated the allotment as a conditional acceptance of an absolute proposal; but this is not so. The condition expressed is only the condition which the legislature imposes; and even if the words requiring the payment of the deposit, and the execution by the subscriber of the subscribers' agreement and Parliamentary contract, had not been mentioned in the letter of allotment, the legislature would have supplied the omission. The letter requesting the allotment of shares mentions the subscribers' agreement and Parliamentary contract; and the allotment is only in accordance with the application. There is no new term in-

(*a*) 15 M. & W. 489; Ante, Vol. 4, p. 308.

(*b*) Ante, Vol. 5, p. 134.

(*c*) Ante, Vol. 4, p. 713.

troduced, and nothing results from the condition. If A. agree to sell his house to B. at a certain price, and B. answers that he will buy at that price if a good title be shewn, the acceptance is absolute; for no new term is introduced which is not imposed by law. The winding-up order constitutes this association a Company; and if the subscribers are not members, it is impossible to say that there are any. By the 7th division of the 4th section of the Registration Act, 7 & 8 Vict. c. 110, the names of the subscribers are required to be registered, shewing that they form a component part of the Company. The old decisions of *Fox* v. *Clifton* (*a*) and *Nockells* v. *Crosby* (*b*) were destructive of meritorious schemes; and the legislature stepped in and gave certain powers on certain conditions, and the subscriptions of the members were declared to constitute a common fund. It is obvious, that the very application by a party for shares contemplates certain expenses, viz. the preparation of the subscribers' contract and Parliamentary agreement, and the printing of the very scrip certificates to which he becomes entitled on payment of his deposit. Is he not a contributory with respect to this outlay? If the subscriptions do not form the assets of the Company, there are none, and so much of the Act as refers to assets has no meaning whatever; the claims of creditors must be against individuals, and the debts of the concern are reduced to personal engagements. If this be so, in what manner can the Winding-up Acts apply? It is a fact that many of these winding-up orders have been made on the petition of simple allottees: *Willey* v. *Parratt* (*c*) was an action by an allottee to recover back his deposit, but he failed. If allottees of shares are not within the provisions of the Winding-up Acts, either for the purpose of contribution or receiving back the surplus of their subscription, it is difficult to conceive the application of these Acts to provisionally registered Companies at all.

(*a*) 6 Bing. 776. (*b*) 3 B. & C. 814. (*c*) 3 Exch. 211.

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The LORD CHANCELLOR.—It has been thought convenient and desirable, that these two cases should be argued as one, the only distinction between them being, that, in the case of *Hutton* v. *Thompson*, the respondent paid the required deposit upon receiving information that certain shares in the proposed concern had been allotted to him; whereas the defendant, in *Norris* v. *Cooper*, took no notice whatever of the letter of allotment. In all other respects the two cases are identical; and, accordingly, the argument has proceeded as well upon the effect of the facts which are common to both cases, as upon the effect of the additional fact of the payment of the deposit by the respondent Thompson. Your Lordships will observe, however, that another point has been argued, which not only applies to the two cases before your Lordships, but to all the proceedings which have taken place under the orders of reference made for the winding up of Companies, inasmuch as it has been contended, that the proposed Companies had never been matured to a sufficient extent to render them subject to the jurisdiction created by the statutes, called the Winding-up Acts; this latter question, it may not be necessary for your Lordships to consider, because, if the facts common to the two cases should lead to a conclusion favourable to the respondents, your Lordships may not think fit to express any opinion upon a matter of so much importance, the determination of the two cases not requiring a decision of that question.

I submit to your Lordships, that it is desirable, that you should have the benefit of the opinions of the learned Judges upon certain questions, the answers to which, if they shall conform to the arguments on the part of the respondents, will lead to the conclusion, that both appeals ought to be dismissed. Those questions are the following:—

First. Ought the name of A. B. (under the circumstances

set forth in the accompanying certificate) to be included in the list of contributories of the Company mentioned in such certificate?

The certificate was as follows:—

"A provisional registration was made under the statute 7 & 8 Vict. c. 110 of a proposed Company, in the name &c. The accompanying prospectus was registered and published, certain persons acted as a committee for the establishment of the Company and to obtain an Act of Parliament, individuals applied to that committee for an allotment of shares, and the committee did accordingly allot shares to the applicants, and among them twenty shares to A. B. Such application and allotment took place in consequence of the accompanying correspondence. (The learned Judges have the papers before them, and will refer to that correspondence.) A. B. took no steps after the application for shares, and neither paid the required deposit nor signed any subscribers' or Parliamentary contract."

Ought A. B. to be considered as a contributory within the intent and meaning of the said Act?

Secondly. The second question which I propose should be submitted to the Judges, will be to the same effect, and upon the same state of facts, except that it will omit the statement that A. B. took no steps upon the letter of allotment, and substitute the fact that A. B., after the receipt of the letter of allotment, paid the required deposit, but did not sign any Parliamentary or subscribers' contract.

As it may be possible, that the answer of the learned Judges to both these questions may be in the affirmative, I propose to put the following question:—

Thirdly. Under the provisions of the 7 & 8 Vict. c. 110, certain promoters provisionally registered a proposed Railway Company, with a large specified capital, to be divided into shares; and certain persons assumed to act as a com-

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mittee, for the purpose of establishing the Company, and allotted shares to individuals who made applications for them. The committee incurred considerable expense, and contracted debts in the preparations to obtain an Act of Parliament; but not being able to procure payment from a sufficient number of shareholders, though a sufficient number of shares had been allotted to form the proposed Company, the project was abandoned.—Did the above circumstances constitute an association, a Company, or partnership, within the meaning and intent of the several statutes made for the winding up of Joint-stock Companies. And would it make any difference if the committee, which contracted the debts, consisted of less than seven in number, or that no joint debt was contracted by seven or more.

As I have before stated, it is desirable to obtain the opinions of the learned Judges upon these three questions; but how far your Lordships may deem it expedient to enter upon the consideration of the third question, you may determine after you shall have received the answers of the learned Judges to the first and second questions.

The learned Judges, having retired and considered the questions submitted to them, returned to the House, and the Lord Chief Baron delivered the following opinion:—

The Judges have considered the questions proposed by your Lordships, and I have to report their answers to the first and second; but they desire time to deliberate as to the third question submitted to them. Upon the first and second questions, I have to report the unanimous opinion of the Judges who have heard the arguments, that neither in the case where shares were applied for and no payment of deposit was made, nor in the case where a payment of deposit was made but there was no signature of the subscribers' or Parliamentary contract, ought the name of the party to be included in the list of contributories of the

Company mentioned in the certificate. We think, that the mere fact of the applicant being an allottee of shares under the circumstances set forth in the certificate, (assuming that he was an allottee, as to which we give no opinion, and as to which several of us doubt,) did not make him responsible for any of the preliminary expenses incurred before the abandonment of the undertaking. We think this was clearly the law prior to the statute 7 & 8 Vict. c. 110; and that none of the provisions of that Act made any alterations in the law on this subject, so as to render an allottee of shares liable beyond what his own contract had done, or to give to his acts or conduct a construction different from what they would otherwise receive.

The LORD-CHANCELLOR, having thanked the Judges, and intimated that the very distinct and important opinion delivered by them upon the first and second questions might render it unnecessary to require their opinion on the third, proposed that the further consideration of the cases be adjourned.

August 8th.

The LORD CHANCELLOR.—The cases of *Norris* v. *Cooper* and *Hutton* v. *Thompson* are appeals from orders of the Vice-Chancellor Lord *Cranworth*, reversing the orders of the Master to whom were referred the adjustments of the affairs of two projected Railway Companies, one of which was called The Wolverhampton, Chester, and Birkenhead Junction Railway Company, and the other was called The Direct Birmingham, Oxford, Reading, and Brighton Railway Company.

The references to the Master were made under the authority of the Winding-up Acts, that is, the statutes of the 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

The cases have been argued at your Lordships' bar, and now stand for judgment; but it may be convenient, that the facts of the cases should be revived in your Lordships'

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recollection. The respondents had several shares allotted to them in the projected Companies. The respondent Cooper in The Wolverhampton, Chester, and Birkenhead Railway Company, and the respondent Thompson in The Direct Birmingham, Oxford, Reading, and Brighton Railway Company; and the only distinction, in fact, between the two cases is, that the respondent Thompson paid the required deposit upon the shares allotted to him, but the respondent Cooper neither paid the deposit nor did any act after the allotment to adopt the shares.

The legal questions submitted for your Lordships' decision in the two cases were identical, and they were therefore, by consent of the parties, heard together at the bar. In *Hutton* v. *Thompson* the additional fact existed, tending to support the respondent's liability, of his having paid the deposit on the shares allotted to him; and it follows, that if your Lordships shall be of opinion that the appeal in that case cannot be sustained, the decision in that case will govern the case of *Norris* v. *Cooper*. It will, therefore, be sufficient for me to state to your Lordships the material circumstances and arguments which are applicable to the case of *Hutton* v. *Thompson*. These facts are as as follow:—In the year 1845, some persons published a prospectus, proposing to construct a railway from Birmingham to Oxford, by means of a Company or Association, with a capital of 2,000,000*l*., divided into 80,000 shares of 25*l*. each. The project was provisionally registered under the statute of the 8 & 9 Vict. c. 110. The prospectus set forth certain names as constituting a provisional committee, and it contained a form of application for shares. About the 10th of October, 1845, the respondent Thompson applied for an allotment of thirty shares, and the shares were allotted to him accordingly, of which he was informed by a letter, dated the 18th of October, which was as follows:—

"46, Moorgate Street, 18th October, 1845.

"Sir,—The Committee of Management have allotted

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to you 20 shares in this undertaking; and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 52*l.* 12*s.*, into one of the under-mentioned banks, on or before Friday, the 24th of October, 1845, or this allotment will be null and void. This letter, with the bankers' receipt appended thereto, will be exchanged for scrip upon your presenting it at the offices of the Company, and executing the Parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th October; and notice will be given when the deeds will be sent into the country.

(Signed) J. B. RAYNER, Secretary."

(The bankers' names followed).

Upon the receipt of this letter, Thompson paid the deposit of 2*l.* 12*s.* 6*d.* per share to one of the bankers named in the letter; but never exchanged the bankers' receipt for scrip, nor executed any Parliamentary contract or subscribers' agreement; and none such was ever prepared.

70,000 shares were allotted by some persons acting as a committee; and the deposits were, by a letter similar to that which I have read, required to be paid on or before the 24th of October, 1845, or, as the letter stated, the allotments were to be null and void. Deposits were paid upon 4295 shares only; and it was, therefore, found impracticable to establish the Company, and the project was abandoned.

On the 21st of December, 1849, an order was made under the statutes before mentioned; and the Master afterwards, acting under that order, inserted the respondents' Cooper's and Thompson's names in the list of contributories to the respective Companies in which shares had been allotted to them.

Against those insertions of their names, the respondents appealed to the Vice-Chancellor Lord *Cranworth*, and his Lordship reversed the order of the Master; and the pre-

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sent appeals are by the official managers against that order of reversal.

The question which arises upon these facts is, whether the name of the respondent Thompson was properly inserted in the list of contributories.

In support of the appeal it was contended, that by the application for shares and the allotment pursuant to such application, and by the payment of the deposit upon the shares allotted, the respondent became a member of the Company, and, as such, liable to be put upon the list of contributories; and it was argued, that, by section 3 of the Winding-up Act, *contributory* includes every *member*, and member is declared to mean 'any person entitled to a share of the assets or accruing profits of the Company;' and that, as by the 7 & 8 Vict. c. 110, s. 3, the word *subscriber* is declared to mean 'any person who shall have agreed to take shares in a proposed Company,' therefore the respondent, being a subscriber within the one definition, must be taken to be a "member" and consequently a "contributory" within the other. But this conclusion by no means follows, because the conditions prescribed, on which he was to become a member and to become entitled to any participation in the profits of the adventure, were, that, besides the payment of the deposit, he should sign the Parliamentary contract and the subscribers' agreement, and exchange the bankers' receipt for scrip; and although the respondent did pay the deposit, he did not perform either of the other conditions; and, according to the decisions which have taken place again and again in all the Courts of Westminster, upon the abandonment of the project, the respondent was not liable to an action at law at the suit of any creditor of the Company.

Upon the part of the respondent it was argued, that he had agreed to become a subscriber for shares, conditionally upon a Company being established with the proposed capital of 2,000,000*l.*, divided into 80,000 shares of 25*l.* each, as proposed in the prospectus; but that no such Company

ever was or could be established, and therefore the whole condition and consideration upon which he agreed to become a shareholder failed, and by such failure it became impracticable for him ever to obtain the shares which he had agreed to take; and that, so far from being liable to contribute to the expenses or debts incurred by the promoters who had ineffectually endeavoured to establish the Company, he was entitled, according to the case of *Walstab* v. *Spottiswoode* (*a*), and to what is now the established law in Westminster Hall, to recover back again the deposits paid; and that it would be contradictory to hold, that payments made by the respondent subjected him to further responsibility, when, in point of law, such payments were recoverable back on a ground of a failure of consideration. The answer thus urged appears to me to be a valid answer in point of law; and that the acts of the respondent, and the other circumstances relied upon in support of the appeal, subjected the respondent to no other obligation or responsibility than being bound to take twenty shares in such a Company as that proposed by the prospectus to be formed, in the event of its being in fact established, but which never took place.

The case of *Upfill* decided by this House was cited and relied upon on the part of the appellant; but in regard to that case, it is only necessary to say at present, that it is an authority rather against the appellant than for him; for by that judgment Upfill was held to be a contributory expressly upon the ground of the conjoint effect of two facts which existed in it; and these two facts were, that he was a member of the provisional committee, and had also paid deposits upon shares; the language of the judgment being, that it was the case of a provisional committee-man "*plus* his acceptance of shares:" and it clearly appears from the judgment, that, if either of those facts had been absent, the opinion of the noble Lord who pronounced the judgment would have been against the appellant.

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The case of *Nockells* v. *Crosby* (*a*) long ago decided, that the preliminary expenses of an abortive scheme must be borne by the projectors, and cannot be thrown upon those who agreed to become shareholders in a proposed Company which was never established.

These cases were argued in the presence of ten of the learned Judges; and your Lordships were pleased to put two questions to them; to which they gave answers, in the opinion delivered by the Lord Chief Baron; and which questions and opinion I beg to repeat to your Lordships. [His Lordship then read the questions with the certificate, and the opinion of the Judges thereon, which are hereinbefore stated.]

The opinion which I have just read is in conformity to what has been established in a variety of cases, and consistent, as I believe, with sound law; and I perfectly concur in that opinion: and if your Lordships think fit to adopt it, it leads to the conclusion that the present appeal ought to be dismissed. And, accordingly, I move your Lordships, that in the case of *Hutton* v. *Thompson* the appeal be dismissed, with costs.

Ordered accordingly.

In the case of *Norris* v. *Cooper*, which, by the absence of the fact of the payment of the deposit, is less strong than the case of *Hutton* v. *Thompson* (which your Lordships have just disposed of), I also move your Lordships that the appeal be dismissed, with costs.

Ordered accordingly.

(*a*) 3 B. & C. 814.

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BEFORE THE LORDS JUSTICES.

Re The Estate of W. F. BROWNE, and of THE OXFORD AND BLETCHLEY JUNCTION AND BUCKINGHAMSHIRE RAILWAY ACTS. *Jan. 23rd.*

On a petition for the confirmation of the Master's report, approving of a proposed purchase wherein to reinvest a sum in Court, the produce of land sold by a tenant for life to a Railway Company, under the provisions of the Lands Clauses Consolidation Act, it is not necessary that the persons entitled in remainder should be before the Court.

Reinvestment in the purchase of copyholds of inheritance, under special circumstances, allowed.

THIS was a petition praying the confirmation of the Master's report.

By the will of the Rev. W. F. Browne, certain freehold, copyhold, and leasehold lands and hereditaments were devised to the petitioner, the testator's grandson, for life; and in the event of his dying without leaving issue, then with similar limitations to his three other grandsons successively; with other remainders over.

The Buckinghamshire Railway Company and the Oxford and Bletchley Junction Railway Company, under the powers of their respective Acts, with which the Lands Clauses Consolidation Act, 1845, were incorporated, contracted with the present petitioner for the purchase of a portion of the devised estates, and the amounts, having been determined by two able practical surveyors, were paid into the Bank of England and invested in the usual manner, under an order of the Court for that purpose.

The petition prayed the confirmation of the Master's report, whereby he had approved of two pieces of copyhold land as a proper purchase wherein to invest a sum of 195*l.* 2*s.*, standing in the name of the Accountant-General of the Court of Chancery, in trust "Ex parte The Buckinghamshire Railway Company, the Account of the Rev. T. S. Browne, the tenant for life." And so much of another sum of 2536*l.* standing in the same name, in trust "Ex parte The Oxford and Bletchley Junction Railway Company, the Account of the Rev. T. S. Browne," as with the first-mentioned sum would be sufficient to raise 1135*l.*, the purchase-money for the two pieces of land; and by the

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same report the Master had also approved the title. The petition also prayed the usual directions as to payment of the purchase-money, and as to the costs of the petition.

At the hearing of the petition an affidavit was read in support of it, shewing, that the greater part of the land sold to the Railway Companies was of copyhold tenure; and that the sum now sought to be invested in the purchase of land of a similar tenure, did not exceed in amount the purchase-money of the copyhold sold. It further appeared that the land now about to be purchased was copyhold of the same manor as that sold to the Railway Companies, and adjacent thereto.

The petition was originally heard by the Vice-Chancellor *Kindersley;* but he declined making any order on it, and expressed a strong opinion that he could not do so in the absence of the parties entitled in remainder. It having been pressed on the Vice-Chancellor's consideration by Mr. *G. L. Russell* and other counsel, that the practice of the Court was never to require the appearance of the parties in remainder; and also that the costs of Railway Companies would be greatly increased by such a decision; the Vice-Chancellor said, that he would consult with the other learned Vice-Chancellors, and mention it again.

On a subsequent day, the Vice-Chancellor said, that he had consulted with the other Vice-Chancellors, and that they were all of opinion that no order could be made on the present petition behind the backs of the persons entitled in remainder. The learned Vice-Chancellor, however, suggested, that the petition should be presented to the Lord Chancellor, and that he himself would make no order on it.

In consequence of this suggestion, the petition now came on to be heard before the Lords Justices.

Mr. *Bethell* and Mr. *Speed*, for the Railway Companies, submitted, that this was a case of great importance to Railway Companies; and, if the objection taken by the Vice-

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Chancellor were allowed to prevail, it would not only entail on them great additional expenses, but would unsettle a practice which had been in daily use for twenty years. That the statutory enactment, which, by the 69th and 70th sections of the Lands Clauses Consolidation Act, empowers the tenant for life to contract to sell, and directs the purchase-monies of land sold to a Railway Company to be re-invested under the supervision of the Court, would in fact be rendered unnecessary, if all the parties interested in remainder must be before the Court. That the summary method intended to be provided by the Legislature would be destroyed. And that, if it were declared necessary that the parties entitled in remainder should appear, steps must be taken to ascertain who were those parties; but the Act gave no directions for that purpose.

[KNIGHT BRUCE, L.J.—In selling, the tenant for life alone contracts; and the persons entitled to the inheritance have nothing to do with fixing the price.]

Mr. *Bethell.*—That is so; the value is fixed by two surveyors, the money is paid into Court, and the manner of dealing with it afterwards is left to the Court. The tenant for life, by the 79th section, represents the inheritance for the purpose of contracting to sell, and he alone afterwards suggests the re-investment. The Court in permitting the re-investment considers the interests of the remainder-men; and it cannot be supposed that those interests would, *per incuriam*, be neglected.

KNIGHT BRUCE, L. J.—In the cases of private settlements, it is the common practice to give the tenant for life a power of sale and exchange, with the consent of the trustees; and the statute appears to me to place the Court in the position of the trustees of the settlement. I can only attribute the comatose state in which I have for so long a time been, with respect to the difficulty now for the first

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time suggested, to the solution which this analogy, by a sort of unperceived reasoning, afforded to my mind.

Lord CRANWORTH, L. J.—The 71st section supports that analogy; for it directs the purchase-money, when under 200*l.*, to be paid directly to the trustees; which certainly would not require the consent of the persons entitled in remainder; but still there exists the difficulty, whether the language of the statute is sufficiently clear to place the Court in the position of the protector of the settlement.

Mr. *Baggallay* appeared for the petitioner, tenant for life.

KNIGHT BRUCE, L. J., then referred to the Registrar, as to the general practice which had thitherto obtained. When he was informed, that the consent of the persons entitled to the inheritance had never been required. The learned Judge then put the case of an application for re-investment, where the tenant for life had incumbered his interest, and inquired whether the incumbrancers would not then be necessary parties.

Mr. *Speed* said, that he had presented petitions under those circumstances, and the incumbrancers had always been before the Court (*a*).

KNIGHT BRUCE, L. J., then said—It appears to me, that the Master would in effect act as the trustee in a settlement; and taking the analogy and practice together, I do not think it necessary that we should interfere in the present instance to unsettle that practice.

Lord CRANWORTH, L. J.—As the practice appears to be settled, I think the old course may be pursued; although I do not say that I should have so decided, if this were a case now coming before me for the first time. I do not think

(*a*) Vide *Ex parte Yeates, Re The Lancaster and Carlisle Railway Company*, ante, Vol. 5, p. 370.

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any harm can result from this decision; for not only the tenants for life, but the Railway Companies, have an interest in looking to the propriety of the reinvestment, as, if anything went wrong, they may be declared trustees for the persons entitled to the inheritance, and be compelled to pay the purchase-money over again.

It appears that the land now proposed to be purchased is copyhold of inheritance, does the Act warrant this application?

Mr. *Baggallay* then referred to the 69th section of the Lands Clauses Consolidation Act, which, by one of its provisions, authorised the monies deposited to be applied "in the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands, in respect of which such money shall have been paid, stood settled." And he submitted, that as the money now sought to be invested was less than the purchase-money of the copyhold land sold to the Company, and as the land proposed to be purchased was part of the same manor, the words of the Act would be satisfied.

The LORDS JUSTICES.—That must appear on the order, which we now make in accordance with the prayer of the petition.

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BEFORE VICE-CHANCELLOR PARKER.

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Dec. 22*nd*.
1852.
Jan. 17*th*.

Re The Great Northern Railway Company's Act, No. 1, 1851,

Ex parte The Mayor, Aldermen, and Citizens of the City of Lincoln.

In cases where the land belonging to a corporation is taken by a Railway Company, and the purchase-money is paid into the Bank, the Court will not allow any steps to be taken with reference to the final application of such purchase-money, unless it be satisfied that the freemen are represented.

THIS was a petition, presented by the Mayor, Aldermen, and Citizens of Lincoln, under the 27th section of the Great Northern Railway Act (14 & 15 Vict. c. xlv). That section, which fully states the facts set out in the petition, is in the following terms:—"Whereas the Great Northern Railway passes through a certain common or piece of waste land in the city of Lincoln, known by the name of 'The Holmes,' vested from time immemorial in the mayor, aldermen, and citizens of the said city, subject to the right of pasturage thereon throughout the year of the freemen of the said city residing within the same: And whereas the Great Northern Railway Company have taken possession, under the powers and provisions of The Lands Clauses Consolidation Act, 1845, of the part of the said common land required by them for the purposes of the said railway, and in respect thereof have paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, the sum of 8471*l*. 7*s*. 6*d*.: And whereas the said mayor, aldermen, and citizens have contracted with the said Company for the absolute sale to them of the land so taken by them, free from the aforesaid rights of such freemen, who are of the number of 500 and upwards: And whereas it is expedient, that the said mayor, aldermen, and citizens, should be enabled to convey to the said Company the land so taken as aforesaid free from the aforesaid common rights, and that provision should be made for the disposal of the purchase money for the same: Be it enacted, that it shall be lawful for the said mayor, aldermen, and citizens of the said city, and they are here-

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by empowered, by deed under their common seal to convey to the said Company and their successors, such part of the said common or waste land as has been taken by them as aforesaid, and the fee simple and inheritance thereof, free from all and every the aforesaid rights of common upon and over such land; and that, out of the aforesaid sum of 8471*l.* 7*s.* 6*d.*, and any other monies to be paid by the said Company for or on account of the purchase of the said land, together with any interest or accumulations thereon, all costs, charges, and expenses of the said mayor, aldermen, and citizens, &c., shall be paid and satisfied; and in the next place, thereout, such sum or sums of money shall be appropriated to the said mayor, aldermen, and citizens of the city of Lincoln, as the High Court of Chancery, by any order to be made In the matter of this Act, and Ex parte The Mayor, &c., upon the application of the said mayor, &c., shall order and direct, as and for compensation for all their rights and interests in such land so to be conveyed, and shall be disposed of accordingly, as monies payable for land purchased from corporations under the Lands Clauses Consolidation Act, 1845, are by that Act directed to be disposed of; and that the residue thereof, and of all interest, dividends, and accumulations, which have or shall have accrued or become due, shall be paid, invested, applied, appropriated, and disposed of in such manner, for the permanent benefit of all or any of the freemen for the time being of the said city of Lincoln residing therein, as the said Court shall from time to time, by any order to be made In the matter of this Act, and Ex parte The Mayor, &c., upon such application as aforesaid, order and direct; provided nevertheless, that seven days notice of every such application as aforesaid, so to be made by the said mayor, &c., shall be given by affixing the same on the outer door of the town-hall of the said city."

The petitioners, in pursuance of the last-stated proviso, caused a notice of the present application to be affixed to

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the outer door of the town-hall of Lincoln. The petition prayed a reference to the Master to inquire the amount of the costs of the conveyance of the portion of "The Holmes" taken by the Great Northern Railway Company; and, after payment of the same, to inquire what part of the sum then in Court (which, having been invested, amounted to 10,241*l.* 14*s.* 3*d.* Three per Cent. Consols) should be appropriated to the petitioners, as compensation for their rights and interests in the land taken by the Company; and also to settle a scheme for the application and disposal of the residue of the sum in Court for the permanent benefit of all or any of the freemen for the time being of the city of Lincoln resident therein.

Mr. *Baggallay* appeared for the petitioners; and, in answer to a question by the Court, stated, that neither the Attorney-General nor the freemen had been served with any notice other than the notice affixed to the doors of the town-hall of Lincoln; but he submitted that the course which had been pursued had satisfied the requisitions of the Act.

The VICE-CHANCELLOR.—It is a very special question, what amount, if any, the corporation is entitled to; because, under the Municipal Corporations Act, all ordinary profits belong to the freemen. The special Act on which the present application is founded does not seem to say, that the order may be made ex parte, but "In the matter of that Act, and Ex parte the Mayor, Aldermen, and Citizens of the city of Lincoln." Any interest that is to be protected ought to be protected properly; and it does not appear that the freemen have been consulted touching the sale to the Company. Important suggestions may be made by the freemen respecting the application of the portion of the fund in Court, to which they are entitled. Probably, the best course will be, to convene a public meeting of the freemen with the view to their electing a committee to represent their interests; and I shall therefore order this petition to stand over for that purpose.

On this day the petition was again mentioned, when, Mr. *Glasse* appearing for the freemen and consenting, his Honor was pleased to make an order according to the prayer of the petition.

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Jan. 17*th.*

BEFORE THE LORD CHANCELLOR.

Re TAYLOR, a Lunatic,

AND

THE YORK AND NORTH MIDLAND RAILWAY (BRIDLINGTON BRANCH) ACT, 1845, and THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

1849.
April 28*th.*

Where the committees of a lunatic's estate, under the powers of the Lands Clauses Consolidation Act, contract with a Railway Company for the sale of a piece of his land, the sanction of the Lord Chancellor must be first obtained, and the costs of the application and of the consequent reference to the Master are costs within the 80th section of the same act, and must be borne by the Company.

IN this case, the committees of the lunatic had, under the powers conferred on them by the 7th section of the Lands Clauses Consolidation Act, contracted with the York and North Midland Railway Company, for the sale to them of a piece of his freehold land; and by an order of the Lord Chancellor, made on the 24th of May, 1848, it was referred to the Master in Lunacy, to inquire and certify whether the contract was a beneficial one, having regard to the provisions contained in the last-mentioned Act.

The Master having by his report approved of the contract, the committees presented a petition, praying the confirmation of it, and the usual directions as to the conveyance of the land to the Company and the investment of the purchase-money; it also prayed, that the costs, charges, and expenses of the petitioners, of and incidental to the conveyance and the investigation, declaration, and verification of the title to the land, and of obtaining and prosecuting the reference, and of the petition and the order to be made thereon, might be taxed and paid by the Railway Company.

Mr. *Prior*, on behalf of the Company, objected to that part of the prayer of the petition, which asked the costs of

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the reference to the Master, submitting, that such costs were not included in the terms of the 80th section of the Lands Clauses Consolidation Act. That the committees had, under that Act, absolute power to contract for the sale of the lunatic's estate; and although it had been decided, that the sanction of the Lord Chancellor was necessary in such a case (*a*), yet, as such a reference was not contemplated by the Act, the costs could not be provided for by the 80th section.

Mr. *J. J. H. Humphrys*, for the petitioners, relied on the general words of the 80th section of the Lands Clauses Consolidation Act, "and of all proceedings relating thereto," as including the necessary costs of the reference to the Master.

The LORD CHANCELLOR.—The expenses incurred in this matter by the lunatic's estate, have been occasioned entirely by the proceedings of the Company; and that estate will not be indemnified, unless the costs of the reference be paid by the Company. The Company might have thought it right, under the Act, to have incurred the expense of going to a jury, instead of entering into the present contract; in which case the committees could only act under the order of the Lord Chancellor. All the world ought to be aware, that the sanction of the Lord Chancellor is necessary to be obtained in the first instance, in cases like the present. As, however, the fund may at a future time be required to be invested in the purchase of land, it will be necessary to keep the Company before the Court; and for that purpose, the fund must be invested in 3*l.* per Cent. Consolidated Bank Annuities, to be carried to the joint account of the committees of the lunatic and the Company. The dividends must also be invested, as they accumulate, to the like account; and the interest, and costs, charges and expenses of the committees, must be paid by the Company, according to the prayer.

(*a*) *Re Wade*, 1 H. & T. 202.

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EXCHEQUER CHAMBER.

Hilary Vacation, 1851.

THE EASTERN COUNTIES RAILWAY COMPANY and RICHARDSON *v.* BROOM (*a*). *Feb. 5th.*

THIS was a writ error on a bill of exceptions to the ruling of *Pollock*, C. B.

The declaration was in trespass for assault and false imprisonment against the Company and B. Richardson.

Pleas—First, not guilty.

Secondly, that the plaintiff assaulted the defendant Richardson, a servant of the Company; and that he was thereupon taken into custody by a constable, who had view, at the instance of the defendants, and was detained, &c.—Verification.

Thirdly, that the plaintiff was a passenger in a railway train which ran from Colchester to London; that, on arriving at the Stratford station, the defendant Richardson, being authorised to collect the tickets, requested the plaintiff to produce and deliver up his ticket. That a bye-law of the Company provided "that each passenger booking his place would be furnished with a ticket, which he was to shew when required by the guard in charge of the train, and to deliver up before leaving the Company's premises, upon demand of the guard or other servant of the Company duly authorised to collect tickets; and that each passenger not producing or delivering up his ticket, would be required to pay the fare from the place whence the train

The plaintiff, a passenger by railway, on the arrival of the train at the terminus, was taken into custody by the Company's servant, and detained at the station upon a charge made by the servant of refusing to give up his ticket or pay his fare, and also of assaulting the servant in the execution of his duty; subsequently, upon the hearing of the charge before the magistrate, the attorney of the Company appeared in support of it:—*Held*, that, though the assault and false imprisonment was capable of being ratified by the Company without an instrument under seal, if committed on their behalf and for their benefit, the facts afforded no evidence of ratification.

(*a*) Before *Patteson*, J., *Wightman*, J., *Maule*, J., *Erle*, J., *Williams*, J., and *Talfourd*, J.

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originally started." That the plaintiff did not deliver up his ticket; whereupon Richardson requested the plaintiff to pay the fare from the place from which the train had started; that the plaintiff refused; and Richardson then requested the plaintiff to quit the carriage, who refused; and, in order to remove the plaintiff from the carriage, Richardson used the necessary force only to do so; that, after the plaintiff had been removed from the carriage, but while on the premises of the Company, he in revenge assaulted Richardson; and that thereupon he was given into custody.—Verification.

Fourthly, that a bye-law provided, that any person in a state of intoxication in the carriages or stations of the Company, wilfully interfering with the comfort of the passengers, and every person obstructing the Company's officers in the discharge of their duty, should be subjected to a penalty not exceeding 40*s.*, and at the first opportunity be removed from the Company's premises, and forfeit his fare. That the plaintiff was intoxicated, and wilfully interfered with the comfort of the other passengers; that, on the plaintiff's refusing to quit the carriage, the defendant Richardson, as servant of the Company, removed him. The plea then alleged an assault by the defendant, and an arrest, as in the third plea.—Verification.

There were other pleas, on which no question arose.

Replication to the special pleas, de injuriâ.—Issues thereon.

The cause was tried before *Pollock*, C. B., at the Middlesex Sittings after Trinity Term, 1849, when the plaintiff had a verdict, damages 50*l.* The bill of exceptions to the ruling of the Lord Chief Baron stated—In order to maintain the said issues, the counsel for the said plaintiff called and examined divers witnesses, who proved that the plaintiff was a passenger in a carriage of the Company, and that the plaintiff was assaulted in the said carriage, and forcibly taken out of the same carriage, and imprisoned by

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the defendant Richardson, then an inspector in the service of the Company, professing to act in so doing as the servant of the Company, and under the assertion, by the said defendant Richardson, of the cause of justification set forth in the defendants' several pleas of justification; but which several pleas, except the several bye-laws therein mentioned, were disproved by the evidence, and were not sought to be maintained by the counsel of the defendants. That the said imprisonment of the plaintiff, after taking him into custody at the railway station for refusing to give up his ticket, consisted, amongst other things, of causing the plaintiff to be imprisoned at the police station at Stratford, upon a charge made by the said defendant Richardson, professing to act in so doing as servant of the said Company, of refusing to give up his ticket or pay his fare, and also of assaulting the said defendant Richardson in the execution of his duty as such inspector at the said railway station. That subsequently, upon the hearing of the said charge, the said Company, by Mr. Duncan, their attorney, appeared before the magistrate in support of the said charge; and the plaintiff also called witnesses to prove that he was sober; and also to prove the damages sustained by reason of the trespasses; and gave no further evidence. And the counsel for the said defendants then submitted to the Lord Chief Baron, that there was no evidence to go to the jury that the Company were guilty of the trepasses alleged, and that they were entitled to a verdict upon the first plea, so far as related to them, the said Company. And the said Lord Chief Baron then ruled, and so directed the jury, that the matters and facts so given in evidence as aforesaid were sufficient evidence to go to them for their consideration, and whereon they might find that the defendants, the said Company, were guilty of the trespasses alleged; and then left it to the jury to say, whether the said Company were guilty. And he directed the said jury, that there was some evidence for their consideration

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upon the question whether the said defendants, the Company, had authorised the trespasses; and in so directing the jury, told them, that if the said Company had given general directions to their servants applicable to persons who were passengers on the railway, as the plaintiff was on the occasion in question, the acting by the defendant Richardson as their servant on such general directions, would be evidence for the consideration of the jury of such authority to commit the trespasses complained of; and that they were at liberty to take into consideration the fact, that the Comyany, by their attorney, had appeared as aforesaid before the said magistrate to support the said charge, as some evidence that the Company were guilty of the trespasses complained of. And the said Lord Chief Baron further stated to the jury, that the said Company would be liable in one of two ways: viz. If, beforehand, they gave instructions to their servants to remove from the carriages of the Company anybody who disobeyed the bye-laws, and commit him to the custody of the police, and they gave their directions generally, then there was no doubt that they would be liable. That they would also be liable, if, discovering that their servant acting on their behalf had given the plaintiff into custody, they adopted the act, and directed their attorney to follow that up and prosecute the charge. That the attorney, merely as attorney of the Company, would have no such authority. That he thought there was some evidence that that which was done was either done by their authority, or was adopted by them after it was done; that he, therefore, left it to the jury to consider, whether the act that was done by those persons was done by the authority of the Company. And the said counsel for the defendants, the said Company, then requested the said Lord Chief Baron to direct the jury, that the defendants, the said Company, could not be made liable as trespassers by a subsequent ratification of an act of trespass of the said other defendant; but the said Lord

Chief Baron then declined so to do, and stated that, in his judgment, there was some evidence for the jury to determine whether the Company were guilty or not. And the said Lord Chief Baron then left the case to the jury upon the evidence aforesaid, with the direction aforesaid; and the jury, upon that direction, found by their verdict that the defendants, the said Company, were guilty of the trespasses; and found the issues upon the first plea against the defendants, the said Company, with 50*l.* damages.

Willes for the plaintiffs in error.—First, an action of trespass for assault and battery does not lie against a corporation aggregate; secondly, if it does, the authority to do the act must be given by an instrument under seal; thirdly, a corporation cannot be rendered liable by ratification; and fourthly, under the circumstances of this case, there was no evidence of ratification.

First.—This objection is open to the plaintiffs in error in arrest of judgment. It may be conceded that trespass lies against a corporation aggregate in some cases, as for taking goods when the matter falls within the scope of their powers: *Maund* v. *Monmouthshire Canal Company* (*a*). But the commission of a tort by a trespass to the person does not fall within their duties. This point was not raised in *Chilton* v. *The London and Croydon Railway Company* (*b*). In Blac. Com. vol. 1, p. 476, it is said, that a corporation "can neither maintain, or be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic:" Br. Abr. tit. "Corporation," 63. On this point he cited Vin. Abr. tit. "Corporation" (P.) 2, (Z.) 2; Year Book, 21 Edw. 4, 7, 12, &c.; Kyd on Corporations, p. 71; *Reg.* v. *The Birmingham & Gloucester Railway Company* (*c*), *Reg.* v. *The Great North of England Railway Company* (*d*), *The King*

(*a*) Ante, Vol. 3, p. 159; 4 M. & Gr. 452.

(*b*) Ante, Vol. 4, p. 4; 16 M. & W. 212.

(*c*) Ante, Vol. 2, p. 694; 3 Q. B. 223.

(*d*) 9 Q. B. 315.

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of the Two Sicilies v. *The Peninsular and Oriental Steam Packet Company* (*a*). [*Wightman*, J.—A corporation may hold land; why may it not then commit an assault by turning a trespasser off?]

Secondly.—Supposing this action does lie against a corporation aggregate, the agent must be authorised by deed under their common seal. An assault is not one of those every day acts, which a corporation may direct without an instrument under seal. [*Patteson*, J.—We have no doubt that that is not necessary.]

Thirdly.—The Company cannot be made liable by ratification. A person cannot be made liable for a trespass by ratification, unless it were originally done on his behalf and for his benefit: 4 Inst. 317, *Wilson* v. *Barker* (*b*). An assault and battery cannot be committed for the benefit of the corporation. [*Wightman*, J.—Suppose an assault were committed by the servant of the Company in defence of their carriages, the act might be held to be for the benefit of the Company.]

Fourthly.—There was no evidence of ratification. [*Maule*, J.—We must take it, on the bill of exceptions, that the Company authorised their attorney to appear and support the charge against the plaintiff before the magistrate. *Patteson*, J.—And, in the event of the charge having been sustained, the Company, and not Richardson, would have received the benefit, as by obtaining payment of the fare.] But, if that be so, they are not liable for the act of Richardson in assaulting the plaintiff: *Brown* v. *Chapman* (*c*). It is a mere inquiry on the part of the Company, who only put the law in motion. It is no ratification of the original arrest. A ratification has no effect unless there be full knowledge of all the circumstances: *Freeman* v. *Rosher* (*d*), *Buron* v. *Denman* (*e*), and *Barber* v. *Rollinson* (*f*).

(*a*) 19 L. J., Chanc., 488.
(*b*) 4 B. & Ad. 614.
(*c*) 6 C. B. 365.
(*d*) 18 L. J., Q. B., 340.
(*e*) 2 Exch. 167.
(*f*) 1 Cr. & M. 330.

Watson contrà.—An action of trespass for an assault does lie against a corporation; and there is no satisfactory reason for the dicta in the old cases, unless they apply to proceedings criminaliter; trespass quare clausum fregit and for taking goods lies against a corporation: *Maund* v. *The Monmouthshire Canal Company* (*a*). And there is no distinction between injury to the person or to property as regards this question. A corporation may justify acts done by their authority in protecting their property. There can be no doubt that the servants of a Company may remove trespassers; and if the removal be wrongful, the Company will be liable. The true rule is laid down by *Parke*, B., in *Sharrod* v. *The London and North Western Railway Company* (*b*). If a person has a remedy against the Company for the loss of his goods, he has a like remedy against them for an assault on him in defence of those goods. In *Reg.* v. *The Great North of England Railway Company* (*c*), Lord *Denman*, C.J., said, "The Court of Common Pleas lately held, that a corporation might be sued in trespass; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which as such has no such duties, cannot be guilty in these cases; but they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large."

The second proposition has been already disposed of.

Thirdly.—If the Company could have authorised the act, can they ratify it? If the result be for the benefit of the Company, there may be a ratification. And here it was for their benefit and on their behalf: Com. Dig. "Trespass," (C.) 1; *Wilson* v. *Tumman* (*d*), *Bird* v. *Brown* (*e*).

(*a*) Ante, Vol. 3, p. 159; 4 M. & Gr. 452.
(*b*) Ante, p. 239; 4 Exch. 580.
(*c*) 9 Q. B. 326.
(*d*) 6 M. & Gr. 236.
(*e*) 4 Exch. 786.

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Fourthly.—The facts shew that there was some evidence of subsequent ratification.

Willes in reply.

PATTESON, J.—The first question arises on the declaration itself, and is quite independent of the particular circumstances of the case. It is alleged, on the part of the plaintiffs in error, as a broad proposition of law, that in no case can an action of trespass for assault and battery lie against a corporation aggregate. Whatever may be the effect of the authorities in the Year Book, it has been expressly held, in modern times, that trespass will lie against a corporation aggregate for breaking and entering a close, and for seizing goods. Then the question is, whether trespass for assault and battery will lie against a corporation; and it has been contended that it cannot; for it is said, that it can neither beat nor be beaten. No doubt that proposition is true as respects its corporate capacity. But it does not therefore follow, that if a corporation, by authority under seal, direct a servant to apprehend and imprison a particular person, an action for assault and battery cannot be maintained against the corporation. The learned counsel who appears for the plaintiffs in error must contend, in order to shew that this declaration cannot be supported, that no such action would lie. But we are all clearly of opinion that it is not so; and that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorise the act done, and it is done by their authority. We are therefore of opinion that the declaration is good; and it is unnecessary to go through the several authorities upon that point. The next question is, whether, in order to render the corporation liable for the act of their servant, it was necessary that that servant should have an authority by deed. It has been decided, many years ago, that a corporation may

be liable in tort for the acts of their servants, although their authority be not under seal. It is not necessary, therefore, further to advert to this point. It has been urged, that there is no exception taken on the ground of want of evidence of previous authority or of ratification. No doubt, the intended exceptions might have been pointed out in a much more specific form; but, taking it altogether, the meaning of the bill of exceptions seems to be, that there was no evidence for the jury; and we think that the objection is sufficiently pointed out, to enable us to go into that question. Is there then any evidence to go to the jury? The evidence is, that there were certain bye-laws; but it was not shewn whether there had been any directions given to Richardson or to the servants of the Company in general to enforce those bye-laws. Looking to all the facts stated, we think that there was no evidence of any previous authority given by the Company. Then, was there any ratification? All the facts that are set forth shew, that, after Richardson had taken the plaintiff out of the carriage, he took him into custody on the several charges of not producing his ticket, of not paying his fare, and of annoying the passengers by being intoxicated. Before the magistrate, the charges were, that the plaintiff did not produce his ticket, did not pay his fare, and that he had assaulted Richardson. The charge of intoxication was not investigated, but that is not material. The only act of ratification contended for was, that the attorney of the Company attended before the magistrate in support of the charge against the plaintiff; but it must be remembered, that this was a charge against the plaintiff, not by the plaintiff against the Company, and that the charge was for having refused to produce his ticket or pay his fare, and for having assaulted Richardson. Not a word is said to shew, that it was known either to the Company or to their attorney, that the plaintiff had been apprehended by Richardson, or that he had been taken into custody on those charges.

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We think, therefore, that there was no evidence of ratification by the Company of the act of Richardson. With respect to the point, whether the Company could ratify the act if done for their use or benefit, there can be no doubt that they could. The assault and imprisonment of a party liable to the Company for not having paid his fare, was an act of a servant of the Company, which manifestly might have been for their benefit. We are clearly of opinion that there might, therefore, have been a ratification of that act. The law is well laid down in distinct terms in the passage from the 4 Inst. 317, "he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." The question of liability by ratification depends upon this, whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it. We agree that the action might lie, and that the act, though not done with the knowledge of the Company in the first instance, might have been ratified by them; but we are of opinion that there was no evidence of any such ratification, and that the direction of the Lord Chief Baron was wrong in this respect. There must therefore be a venire de novo.

Venire de novo (*a*).

(*a*) See *Roe* v. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, post.

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COURT OF EXCHEQUER.

Easter Term, 1851.

THE WATERFORD, WEXFORD, WICKLOW, AND DUBLIN RAILWAY COMPANY *v.* DALBIAC. *May 2nd.*

DEBT for calls.

Plea, that, by an Act of Parliament (9 & 10 Vict. c. ccviii.) for making a railway and branch, to be called "The Waterford, Wexford, Wicklow, and Dublin Railway," the plaintiffs were empowered to make calls as therein specified; and the capital was required to be 2,000,000*l.*; and that, by another Act (10 & 11 Vict. c. lxi.), it was enacted, that it should be lawful for the plaintiffs to put in force all the powers of the first-mentioned Act, and of the Acts therein recited —(The Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, and The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20,)—as regarded that portion of the said Railway which is situate between the Dublin and Kingstown Railway and Wexford, so soon as the sum of 1,500,000*l.* had been subscribed. That that sum had not been bonâ fide subscribed when the said calls were made.—Verification.

General demurrer, that it was not a condition precedent to the right of the Company to make calls, that the sum of 1,500,000*l.* should have been subscribed.—Joinder.

Peacock, in support of the demurrer.—The plea is bad. The 22nd section of the 10 & 11 Vict. c. lxi. recites, that, by the provisions of the Lands Clauses Consolidation Act, 1845, as extended to the Act authorising the construction of the said Waterford, Wexford, Wicklow, and Dublin Railway, it is required that the whole of the capital applicable to the construction of the said Railway, as limited

Where it was enacted, that, "so soon as the sum of 1,500,000*l.* shall have been subscribed &c., it shall be lawful for the Company to put in force all the powers of the said Act authorising the construction of the said Railway, and of the Acts therein recited," viz. the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act, as regards a portion of the Railway:—*Held*, that the raising of the capital was not a condition precedent to the power of the Company to make calls, but only to their right of exercising the compulsory powers for taking land.

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and defined by the last-mentioned Act, shall be subscribed, and a certificate thereof obtained in manner by the said Lands Clauses Consolidation Act directed, before any of the compulsory powers conferred by the said Act authorising the construction of the said Railway, or by the Acts therein recited, with reference to the purchase of lands, should be put in force; and that that portion of the Railway between the Dublin and Kingstown Railway and the town of Wexford might be constructed with great advantage to the public, before the whole capital required for the formation of the whole line of Railway might have been subscribed; and "that it is estimated that, of the capital of 2,000,000*l.* authorised to be raised by the said Act authorising the construction of the said Railway, the sum of 1,500,000*l.* would be sufficient to complete so much of the said line as is situate between the said Dublin and Kingstown Railway and the said town of Wexford; and that the sum of 500,000*l.*, the residue of the said sum of 2,000,000*l.*, would be sufficient to complete such portion of the said line as is situate between the town of Enniscorthy and the terminus of the said Railway near the city of Waterford;" it then enacts, "That when and so soon as the sum of 1,500,000*l.* shall have been subscribed, and a certificate thereof obtained in manner required by the said Lands Clauses Consolidation Act with reference to the subscription of the whole of the capital of the Company, it shall be lawful for the said Company to put in force all the powers of the said Act authorising the construction of the said Railway, and of the Acts therein recited, as regards that portion of the said Railway which is situate between the said Dublin and Kingstown Railway;" and that "nothing herein contained shall be held to authorise the said Company to exercise any of the compulsory powers of the said Act, with regard to the execution of that portion of the line of the said Railway which is situate between the said town of Enniscorthy and the termination of the said Railway near

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Waterford, until the whole of the said capital of 2,000,000*l.* has been subscribed, and a certificate thereof obtained in manner required by the said Lands Clauses Consolidation Act, 1845." Now, the meaning of this section is, that the Company shall not have the power of taking land until the capital is paid up, but it does not affect their power of making calls. [He was then stopped by the Court.]

J. Grant (with whom was *Welsby*) in support of the plea. —The 22nd section empowers the Company, so soon as the whole of the capital of 1,500,000*l.* shall have been subscribed, &c., to put in force "*all the powers*" of the said Acts. It does not empower the Company to put in force *the compulsory powers* given by the prior Acts. Unless the defendant's construction of the 22nd section is the true one, it is difficult to see what operation it can have. [*Pollock*, C. B.—The power mentioned in that section, no doubt, means the power of constructing the line, and of taking the land compulsorily.] This plea was allowed to be pleaded in *The Waterford &c. Company* v. *Logan* (*a*).

POLLOCK, C. B.—The plea is clearly bad. The plaintiffs are not restricted by the section in question from making a call until the capital has been paid up.

PARKE, B.—The restriction is to be confined to the powers given for the formation of the line.

PLATT, B., and MARTIN, B., concurred.

Judgment for the plaintiffs.

(*a*) 19 L. J., Q. B., 259.—It was afterwards holden bad, without argument against the plea: MS. Queen's Bench, M. T. 1851.

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May 12*th*.

BLAND *v.* CROWLEY and Another.

By an agreement under seal between the plaintiff and the defendants promoters of a bill in Parliament for making a Railway, after reciting that the line of Railway was proposed to be carried close to the plaintiff's park, and through some of his land, which bill he had opposed, he, in consideration of the covenants therein contained, acceded thereto: It was witnessed, that, in consideration of the covenants on the defendants' part, the plaintiff did covenant that he would accede to the bill, provided it passed in the present or ensuing session of Parliament; and, in consideration of the assent given to the bill by the plaintiff, the defendants covenanted, that, in the event of the bill passing, the Company should pay him for so much land intersected by the line as might be required, at the rate of 120*l.* per acre; and that they should pay him 3000*l.* in full compensation for the general damage which the line should or might do to the mansion, park, and estate, including therein the crossing of the road near the entrance of the park, the obstruction of views, &c., the expense of temporary residence during the progress of the works, the depreciation in value as a residence, the additional expense in the cultivation of the farms by the alteration of the road, and all other damage to be done to the mansion and park. And the plaintiff agreed, on tender of 120*l.* per acre, and 3000*l.*, that he would convey:—*Held*, per *Parke*, B., and *Platt*, B., that the defendants had thereby bound themselves that the Company should pay the 3000*l.* on the passing of the Act, although the Railway should not be constructed, or any actual damage be done to the plaintiff; but per *Pollock*, C. B., that the taking of the land and damage done were conditions precedent to the payment of the 3000*l.*

COVENANT.—The declaration stated, that the defendants and John Lawrie, since dead, on the 25th of July, 1845, being three of the provisional directors of a Company registered provisionally, who were promoters of a bill then in Parliament to enable them to make a railway, and which said Company, when incorporated, was intended to be called "The Direct London and Portsmouth Railway Company," by articles of agreement, between the plaintiff of the first part, and the defendants and the said John Lawrie of the second part, sealed &c., after reciting that, according to the parliamentary plans deposited with the clerk of the peace for the county of Surrey, the line of the said railway was proposed to be carried close to the park of the plaintiff in the parish of Leatherhead, called Randalls Park, and through some of his land in that parish; and that the plaintiff had, until that time, dissented from and opposed the said bill; but, in consideration of the covenants and agreements thereinafter contained on the part of the parties thereto of the second part, the plaintiff had consented to assent thereto: It was witnessed, that, in pursuance of the said agreement and in consideration of the covenants and agreements of the parties thereto of the second part, the plaintiff did thereby

covenant that he would accede to the bill, provided the same should pass into a law in the then present or then ensuing session of Parliament; and, in consideration of the assent given to the said bill by the plaintiff, the defendants did thereby covenant with the plaintiff, that, in the event of the said bill passing into a law in the present or ensuing session of Parliament, the said Company so to be incorporated, first, should pay to the plaintiff, for such of his said land intersected by the said line of railway as might be required for the purposes thereof, or as might be severed from the remainder of the fields, as shewn in the parliamentary plans, at and after the rate of 120*l.* per acre, such sum to include all damage to arise from severance. Second, that the said Company should pay to the plaintiff the sum of 3000*l.*, in full compensation for the general damage which the said line of railway should or might do to the said mansion, park, and estate, called Randalls, including therein the crossing of the road near the entrance of the park by a bridge, the lowering of the said road, the obstruction of view, disturbance of the privacy and seclusion of the said park and mansion, the expense of temporary residence during the progress of the works of the said Company, the depreciation in value as a residence, the additional expense in the cultivation of the farms by reason of the alteration in the road leading to Leatherhead and other towns in the neighbourhood, and of all other damage to be done to the said mansion and park. And the plaintiff did thereby agree with the parties of the second part, that, on tender to him by the said Company of the sum of 120*l.* per acre, and so in proportion for any less quantity than an acre, of so much of the said land required by the Company for the purposes of the railway, and also on tender to him by the said Company of the said sum of 3000*l.* and a sum of 300*l.*, he would convey to the Company the said lands. The declaration then alleged, that the plaintiff, in pursuance of the said agree-

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ment, assented to the said bill passing into a law; and that the said bill passed into a law in the session of Parliament next ensuing the making of the said agreement; and the said Company became thereby incorporated. The declaration then assigned as a breach, that, although a reasonable time for the payment of the 3000*l.* had elapsed, and although requested, yet neither the said Company nor the defendants had paid the same.

Fourth plea, that the said Company did not enter upon the said lands of the plaintiff.

Fifthly, that the quantity of the said land of the plaintiff intersected by the line of the railway was not nor was any part thereof required by the said Company for the purposes of the said railway, and that neither was it nor any part thereof severed from the remainder of the fields as shewn in the said parliamentary plan.

Sixthly, as to the nonpayment of the 3000*l.*, that the park, mansion, and estate had not been deteriorated in value.

Special demurrer to the fourth plea, that it was unimportant whether the Company ever entered upon the lands or not; that, if the lands were either required for the railway or were severed, the plaintiff would be entitled to be paid; and that, at all events, the plea offered no answer to the breach of nonpayment of the sum of 3000*l.*

To the fifth plea, that it afforded no answer to the nonpayment of the 3000*l.*, as the Company had entered and marked out that part of the land for which that sum was to be paid.

To the sixth plea, that the plea was wholly immaterial, and afforded no defence whatever.—Joinder in demurrer.

Peacock, with whom was *Dowdeswell*, in support of the demurrer.—The fourth and fifth pleas afford no defence. The meaning of the agreement is, that if the plaintiff will not

oppose the passing of the bill, the Company shall pay 3000*l.* upon its passing; the withdrawal from opposition was the consideration for the payment of the 3000*l.* Neither the entry upon the land, nor the severance or actual damage, is a condition precedent to the payment of the money. It is to be paid for the damage "which shall and may be done." The possible deterioration was the contemplated damage. If not, supposing that there were no deterioration, or an improvement, is the money not to be paid? If damage is to be a condition precedent to the payment, the whole of the damage specified must be so also; and so the defendants might escape altogether by reason of some inconsiderable damage specified not occurring.

Bramwell (with whom was *Burchell*) contrà.—The agreement was made with reference to the Lands Clauses Consolidation Act (*a*), substituting the mode thereby provided of assessment, and so the parties stipulate for possible damage. If not, supposing the line to be abandoned, the defendants would be liable to pay the 3000*l.*, which clearly was not intended. Besides, there is no time specified for payment of the money. "In the event" does not mean "when." The intention of the parties is, that as soon as the bill passes, and land is required, and the 120*l.* per acre payable, then is the money payable for the damage to be done by the line, not by the passing of the bill. The damage is that contemplated by the Lands Clauses Consolidation Act.—He cited *Reg.* v. *The Eastern Counties Railway Company* (*b*).

Peacock in reply.

Cur. adv. vult.

PLATT, B.—The question raised by these pleadings is, whether, according to the true construction of the cove-

(*a*) 8 & 9 Vict. c. 18.
(*b*) Ante, Vol. 2, p. 736; 2 Q. B. 347.

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nant of the defendants, the payment of the sum of 3000*l.* depended upon the Company's entry upon the plaintiff's lands, or their requiring for the purposes of the railway the whole or part of the plaintiff's land intersected by the proposed line of railway. The solution of this question depends upon the intention of the contracting parties, to be collected from the recital and stipulations of the deed. By the recital, the sole object of the contracting directors seems to have been, to buy off the plaintiff's opposition; and the object of the plaintiff to have been, to secure the price for which he would abandon it. Such being their respective objects, on the 25th of July, 1845, the plaintiff, in consideration of the covenants and agreements of the contracting directors, covenanted to assent to the bill, provided it should pass into a law within a particular period; and the defendants and Lawrie, in consideration of the assent given to the bill by the plaintiff, covenanted with the plaintiff, that, in the event of the bill passing into a law in the then present or ensuing session of Parliament, the Company to be incorporated thereby should fulfil the following stipulations, conditions, and agreements: —First, that the Company should pay for such of his land intersected by the said line of railway as might be required for the purposes thereof, at a certain rate per acre; and secondly, that they should pay to the plaintiff the sum of 3000*l.* in full compensation for the general damage which the said line of railway should or might do to the said mansion, park, or estate, called Randalls, including therein the crossing of the road near the entrance of the park by a bridge, and other particular kinds of damage done to the estate. The particular description of damage agreed to be included as the subject of compensation does not appear to me to throw any light upon the construction of the covenant. It seems to have been added in order to protect the Company from any further claim for compensation. And it should be observed, that, although the

damage for which the compensation was to be made might be intended to include the damage particularly specified, it does not follow that it was not intended to include other damage which might result from the Company's bill passing into a law, such as the depreciation of the value of the plaintiff's estate resulting from portions of it being, during the period so prescribed for executing the works of the Company, subject to the exercise of their power over it. Without, therefore, embarrassing the question with unnecessary considerations, what is the engagement which the covenant, read down to the word "Randalls," assumes? The money was to be paid in the event of the bill passing into a law. What other event was to happen before the liability to pay was to attach? No other event is mentioned in the covenant. The liability could not have been postponed until after the Company's entry on the land, as the plaintiff was not bound to give them possession until they had tendered not only the price of the land but the 3000*l.* also. The deed does not contain any clause tending to shew that the liability to pay the compensation was to depend on the Company's requiring the land for the purposes of the railway. The contracting directors covenant that, in the event of the Act passing, the incorporated Company should pay a sum certain as a compensation for general damage, which should or might be done to the plaintiff's estate. As the sum was ascertained, why should not the parties have agreed that it should be paid forthwith? The plaintiff might have distrusted the power of the projectors to execute their project, and so have anticipated the possibility of its abandonment, and the damage which even in that case he would be likely to sustain.

The argument deduced from the Lands Clauses Consolidation Act cannot alter the distinct terms of a contract. If we were to permit such alteration, we should make for the contracting parties a bargain which they never con-

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templated. Upon the whole, therefore, it seems to me, that, upon the bill which incorporated the Company passing into a law, the liability of the defendants and Lawrie to pay the 3000*l.* attached; that, consequently, neither of the pleas is an answer to the declaration; and that judgment on the demurrer should be given for the plaintiff.

PARKE, B.—The question in this case is as to the true construction of a deed, which was prepared apparently in the confidence, that, if the bill for making the Direct Portsmouth Railway passed into a law, the promoters would certainly carry the undertaking into effect. Had the parties contemplated the possibility, that, after the bill passed, the railway would have been abandoned, it is probable that a distinct provision would have been made for that event, leaving no doubt whatever as to the true intention of the contracting parties. As the deed is framed, some doubt may be entertained as to what the parties would have stipulated if the present state of facts had been presented for their consideration. But all we have now to do is to ascertain the meaning of the words they have actually used; and, in construing the deed, we must adopt the established rule of construction, to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed. I think that the parties have bound themselves by their covenant, that the Company is to pay the 3000*l.*, for which the action is brought, immediately after the passing of the Act, although the railroad should not be constructed, nor any actual damage should be done to the plaintiff. They have covenanted, that, in the event of the bill passing into a law in the then present or ensuing session of Parliament, the Company shall perform two covenants: First, that the Company shall pay at the rate of 120*l.* per acre for all land

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that might be required, and for damage by severance. If no land should be required, the stipulated price would not be payable; and as none was required, the defendants cannot be called upon to pay any part of the price. Secondly, that they are to pay 3000*l.* to the plaintiff in full compensation for the general damage which the line of railway should or might do to the plaintiff's mansion-house, including therein the crossing of the road near the entrance of the park by a bridge, the lowering of the road, the obstruction of the views, disturbance of privacy, the expenses of temporary residence, depreciation of value as a residence, the additional expense in the cultivation of farms, by reason of the alteration of the road leading to neighbouring towns, and of all other damage to be done to the mansion-house and park. This latter covenant is a distinct and separate one, and is not made to depend upon the contingency of the Company requiring land. Then follows a covenant, that the plaintiff shall convey, on a tender of 120*l.* per acre and the 3000*l.* Now, there is no time expressly stipulated for the payment of the 3000*l.* The plaintiff is not bound to convey any land without the payment both of the price of the land and of the 3000*l.*, thus obtaining a lien on the land for both; but the defendants are not bound to pay the 3000*l.* at any precise stipulated time. All that is covenanted is, that, in the event of the bill passing, the sum shall be paid as a compensation for specified damages that shall or may be done, and all other damage to be done. It is not said, that, when the bill is passed, the money shall be paid, but only in the event of its passing it shall be paid; and this difference of expression was pointed out by the Court in the course of the argument; and it was suggested, that the covenant was to be read in the same way, in the event which has happened of the passing of the bill, as if it had been introduced into a deed prepared after the bill had passed; and if so, it would not be construed to be a covenant that it was to be paid, unless damage of the na-

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ture specified had actually occurred. Even if so read, it would have been questionable whether that would have been the true meaning of the covenant; a difficulty would have occurred as to the time of payment. Would it be payable when any damage, however small, should have occurred? If so, greatly more than its amount would be payable, for the whole sum would become due, and there is no provision for the payment of a proportional part. On the other hand, if it would be payable only when all the possible damage had been sustained, the payment might be indefinitely postponed, and possibly never arrive. But, in truth, this mode of considering the question, as if the deed had been executed after the passing of the Act, is certainly erroneous. There is the greatest difference between such a covenant before the bill passes, and afterwards. After the bill became a law, there could be no reason for paying money to the plaintiff except as a compensation for actual damage. Before the bill becomes a law, the plaintiff might oppose it, and possibly with success; and the covenant not to oppose furnishes a good reason for making a covenant to pay absolutely. It is the price to be given to the plaintiff for agreeing to give the Company, through the medium of the Act, a power for three years to affect his estate by exercising the powers of the Act; and the frame of the deed in this case shews clearly that the plaintiff's assent was the consideration for which the defendants covenanted that the money should be paid; indeed it is expressly so stated. I cannot, therefore, consider this covenant of the defendants to be on the same footing as if it had been introduced in the same words into a deed executed after the passing of the Act, as it is the condition precedent to the covenant taking effect; the money is to be paid at some time; and no precise time being fixed, it is payable immediately. It is not stated that it is to be payable as soon as any damage should be done, or after all

should be done; and the inconveniences above pointed out from either construction form a good reason for not adopting it. Neither can we say, that the payment ought to be at the period when, according to the provisions of the Act, the time for assessing damage would arise; for that would be to alter the language of the deed, and introduce new terms into it; and indeed all the damage specially mentioned would not be the subject of compensation to the plaintiff, if the covenant had not been introduced, the rule upon that subject being, as lately laid down by the Court of Queen's Bench (I think very rightly), that the test, whether lands are "injuriously affected" by the construction of a railway, is, whether they are deteriorated in value by an act for which, if done by an individual without the authority of Parliament, the landowner might maintain an action: *Glover* v. *The North Staffordshire Railway Company* (*a*). The enumeration of the above-mentioned particulars seems to have been made, to give a reason for the bargain for so large a sum; the damages enumerated forming reasonable objections, on the part of a resident gentleman, to the proximity of the railroad, though not entitling him to compensation. It is to be observed also, that the mere passing of the Act would practically be a damage to the plaintiff; because it would render his place less saleable, by reason of the power in the Company to make the railroad during the time allowed by the Act, though the road should never be actually attempted to be made. Without then altering any of the words of the deed, and according to their ordinary meaning, we arrive at a very reasonable construction of the covenant in question, that the 3000*l.* is really the price of buying off the plaintiff's opposition; and he having assented to the bill passing, it must be paid, and, when paid, the plaintiff is not to insist afterwards upon any compen-

(*a*) 20 L. J., Q. B., 376.

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sation whatever for any kind of damage. In this view it is immaterial whether the road be constructed or attempted to be constructed or not; the only condition precedent is the passing of the Act of Parliament; and that being averred to have taken place, the plaintiff is, in my opinion, entitled to recover.

POLLOCK, C. B.—The question in this case is, what is the true construction of the contract into which the parties have entered? Two constructions are presented to our attention. Upon the one side it is contended, that the agreement means, that, in consideration of the assent of the plaintiff to the passing of the bill, the defendants agree that, in the event of the bill passing into a law, this Company would fulfil certain conditions, one of which was, to pay to the plaintiff the sum of 3000*l.* in full compensation for general damage which the railway shall or may do to the mansion, park, and estate belonging to the plaintiff, including certain kinds of specified damage and injury, none of them, it is to be observed,—not one single individual source of damage which is there enumerated, —being of that description, except that which would arise from the construction of the railway. As to some of the damage which has been alluded to by my Brother *Parke* in his judgment, such as that the estate could not be conveniently sold in the meantime, from the liability to be taken or not taken during the period of three years, no such uncertainty in respect of the enjoyment of the estate, or the possibility whether the railway would or would not be constructed,—no damage of that sort—is mentioned in the agreement; none but the description of damage which alone would arise from the actual making of the railway. The plaintiff contends, that the only condition precedent to his recovering the money is the passing of the Act, and the consideration he gave was his assent to the bill; and he contends, that, as soon as the bill passed, his title to the

3000*l.* accrued. Upon the other hand, the defendants contend that the agreement was, in effect, to settle the amount of damage between the claimant and the Company when any damage should be done; and if the Company should not prosecute the scheme at all, they were not bound to pay the sum of 3000*l.* In considering this agreement, I think we are entitled, or rather bound, to consider not only the actual words of the contract itself, but all the circumstances of the transaction as far as they appear, the state of the law, and the known enactments of the public statutes which have reference to the subject-matter. Now, the public Act of the 8 & 9 Vict. c. 18, makes provision for compensating owners whose lands may be taken for undertakings of a public nature; and it divides the compensation into two parts, namely, the sum to be paid for the value of the land to be purchased, and the sum to be paid as compensation for the damage done to other land belonging to the same owner; and, as these clauses form part of the general law of the land, not merely presumptively known to all persons, but probably referred to and studied by those who prepared this agreement, I think we are entitled to look at those clauses just as if they had been embodied in the agreement itself; and it appears to me, so reading the agreement, and so looking at the public law of the land, that the agreement between these parties was made expressly with reference to these clauses.

Now I find, by the terms of the agreement, that the Company are to perform the following stipulations and conditions, which are two, and two only: first, they are to pay for so much of the land as may be required, or may be severed from the remainder; and they are to pay for it at the rate of 120*l.* an acre, and so in proportion; and as the Company are to purchase at that rate not only all the land that is required, but all the land that is severed from the remainder, the price of the land naturally and necessarily

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includes the price of the severance. If you buy all that is severed, there can be no damage remaining to be paid for by the act of severance. The second stipulation, that under which the question now falls, is to pay 3000*l.* in full compensation for the general damage which the line of railway shall or may do to the mansion, and to the other lands of the plaintiff which are not taken, and which are not severed; and then there is a covenant by the plaintiff, that, upon the tender of these two sums, namely, the value of the land at 120*l.* an acre, and the sum of 3000*l.* before mentioned, he the plaintiff would convey the land and deliver possession to them. Now I do not say that the order in which these stipulations are placed makes the one a condition precedent to the other; but in construing the words the parties use, it may not be unimportant to consider that they have made two stipulations: the first is, that the land shall be paid for; the second, that damage shall be paid for. The present contention on the part of the plaintiff is, that the first stipulation is of no importance whatever, and has no precedence whatever, with respect to the second; but that the Company was bound at once, as soon as the Act passed, to perform the second portion of the agreement, and without any reference to the first at all. Inasmuch, however, as these two conditions are always in the agreement mentioned together, I infer from this, and from the manner in which they are mentioned, that the agreement had reference to the question which, upon the passing of the Act, should arise between the plaintiff and the Company; and that it merely meant to provide, that, instead of resorting to arbitrators or a jury in the event of the Act passing, the claim of the plaintiff should at once be considered to be settled by the agreement, probably upon very liberal terms, the land at so much per acre, and the general damage at a gross sum; but that it was not intended to accelerate the payment of either sum, still less to make the latter payment of 3000*l.*

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payable instanter, wholly irrespective of whether any land should be taken or any damage done. It appears to me, that if this agreement had been entered into after the passing of the Act, no doubt could have arisen as to its construction; and if that be so, I do not see why it may not be construed in the same way, although the agreement was made before the passing of the Act. Its effect would then be, that, on the one hand, the owner of the land consented to the passing of the Act; there would be no mischief to him whatever if the Act did not pass at all; his consent to the Act amounted to nothing unless the Act did pass; on the other hand, if the Act did pass, the agreement would arise, that he should be paid for his land, and compensated for the damage, in the manner stipulated by the agreement. And I understand the plaintiff to say this: If I assent to the passing of the Act, or do not oppose it, you must agree to the stipulation, that I shall stand upon a certain favourable footing in respect of compensation, it being distinctly understood beforehand, so that I may have no extra costs to pay, and no expenses to incur, and no uncertainty or anxiety to sustain. The expression "shall or may," used with reference to damage to the mansion and other lands of the plaintiff, was urged upon us by the plaintiff's counsel, as shewing that the sum of 3000*l.* was to be paid whether any damage was done or not. But his argument certainly produced no effect upon my mind, for the expression "general damage which the line of railway shall or may do to the said mansion," &c., in my judgment, and with reference to the subject-matter of the agreement, and to the statute which regulates the rights of the parties, is grammatically to be read "shall or may actually do to the said mansion;" and if the word actually was in the deed, I think it is perfectly certain that the plaintiff could not claim the 3000*l.*, until some actual damage should be done; and I may observe here, that, in the 18th section of the Act, "damage that may be sustained" is the expression that is

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to be found. That is an expression which it is impossible to construe in any other way than as damage (not possible damage) that actually may be sustained. I think, therefore, we are not only doing no violence to the language, but it seems to me that the very language of the agreement, with reference to the language of the Act, uses the expression "shall or may be done" as meaning "shall or may actually be done." Considering, therefore, all the circumstances which appertain to the agreement, and looking to the language used, I do not find myself fettered by any such grammatical construction opposed to the view I have taken, as compels me to decide in a manner which, I must say, I think is not only contrary to the intention of the parties, but exceedingly contrary to the justice of the case, and the general policy which should be observed in cases of a like nature. I must say, I entertain no doubt whatever that the construction I have put upon the contract is that which the parties intended; I think it is by far the most reasonable construction, and for that reason I adopt it. The whole scope of the agreement appears to me much more to resemble an arrangement to get at the value of the compensation, if by the passing of the Act that question should arise between the parties, than to provide for the payment of 3000*l.* at all events, if the bill should pass, without reference to whether injury should be incurred or not; and as the injuries for which compensation is provided by the agreement are all of them such injuries as cannot arise except from the actual construction of the railway, it does not include any other injury, and certainly does not include the injury which my Brother *Parke* has referred to, namely, that the land would be tied up for a certain period, with a prospective possibility of mischief, which might or might not be done. As no such injury as that is alluded to, it seems to me to import, from the very language used by the parties, that they did not intend that compensation should be made except in the

event of the railway being actually made. I think, therefore, that our judgment ought to be for the defendants; but as my learned Brothers are of a different opinion, the judgment of the Court will be for the plaintiff.

Judgment for the plaintiff (*a*).

(*a*) *Martin*, B., having been engaged as counsel in the cause, gave no opinion.

EXCHEQUER CHAMBER.

Easter Term, 1851.

WILSON *v.* THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.

May 16*th*.

ERROR on a judgment of the Court of Exchequer. Debt for calls.

The form of declaration given by 8 & 9 Vict. c. 16, s. 26, is sufficient on special demurrer.

The declaration alleged that "the defendant *is* the holder of ten shares in the said Company, and is indebted to the said Company in 100*l*. in respect of a call of 10*l*. upon each of the said shares."

Special demurrer, that the declaration does not contain any allegation that the defendant was a holder of the shares at the time the calls were made. The demurrer was overruled.

Willes for the plaintiff in error (*a*).

Welsby contrà.

(*a*) Before *Patteson*, J., *Maule*, J., *Wightman*, J., *Erle*, J., and *Williams*, J.

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PATTESON, J.—The legislature has given the form of declaration, and we cannot say that it is not sufficient. The judgment of the Court below must be affirmed.

Judgment affirmed.

COURT OF EXCHEQUER.

Michaelmas Term, 1850.

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Nov. 20*th*.

WILSON *v.* THE CALEDONIAN RAILWAY COMPANY.

The defendants' line, with the exception of six miles, was in Scotland, their principal office was there, and they had no office out of Scotland, except a joint station with another Company at Carlisle, used only for receiving passengers and goods. By one of their Acts the Companies Clauses Consolidation Act was incorporated with the Company's Act, so far as was necessary for carrying into effect the English portion of the line:—*Held*, that a service of a writ of summons on the Company's secretary, while attending a meeting in London, was sufficient.

THIS was a rule obtained by *Rew* calling on the plaintiff to shew cause why the service of a writ of summons should not be set aside for irregularity.

From the affidavits it appeared, that the writ in question, which was in debt, was served on the secretary, who resided at Glasgow, whilst he was attending a meeting of shareholders in London. That the principal office of the Company always was at Glasgow; and that there was no office out of Scotland, except a railway station at Carlisle, which was occupied jointly by the Company and the Lancaster and Carlisle Railway Company, for passengers and goods, but not for transacting any general business of the Company. That the Company was incorporated by the 8 & 9 Vict. c. clxii. for the purpose of making a railway from Carlisle to Edinburgh and Glasgow; that the line was wholly in Scotland, except about six miles, or thereabouts, which was in Cumberland. That the plaintiff's claim arose out of the amalgamation of a Scottish Railway, called the Polloc and Govan and Clydesdale Junction Railway, with the Caledonian Railway Company. That the secretary had no authority from the Company to accept service of process out of Scotland.

Willes shewed cause.—The claim in this action not being local the Court has jurisdiction over the subject matter of it, and the only question is, whether the writ has been properly served. At common law, the proceedings against a corporation was by *distringas* or by application to Parliament (*a*); but by the Uniformity of Process Act (*b*), every writ of summons against a Company may be served on the treasurer or secretary. Independently of this, the 8 & 9 Vict. c. clxii. s. 1, enacts, that the Scotch Companies Clauses, Lands Clauses, and Railway Clauses Consolidation Acts, 1845, (8 & 9 Vict. cc. 17, 19, and 33) "shall, so far as not otherwise provided by this Act, be incorporated with and form part of this Act." And by section 2, after reciting "that a portion of the railway and works thereinafter authorised to be made and maintained will be situate in that part of the United Kingdom called England," enacts, "that so far as may be necessary for carrying into effect the object and purposes of this Act, in relation to such portion of the said railway and works," the Companies Clauses, the Lands Clauses, and the Railway Clauses Consolidation Acts, 1845, "shall apply to and form part of this Act;" and by section 135 of the Companies Clauses Consolidation Act, "any writ or other proceeding at law or in equity" may be served on the Company by being given personally to the secretary. And the 137th section of the Scotch Act contains a similar provision. Therefore, the writ has been properly served, either under those Acts or under the 2 Will. 4, c. 39. In *Evans* v. *The Dublin and Drogheda Railway Company* (*c*), the Company was out of the jurisdiction; here the defendants are within it, with respect to that portion of their line in England; and as to that portion a mandamus would clearly lie against the Company.

Rew in support of the rule.—The only question is

(*a*) Tidd, Pr. 121. (*b*) 2 Will. 4, c. 39, s. 13.
(*c*) Ante, Vol. 3, p. 760; 14 M. & W. 142.

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whether the defendants are a Scotch Company or not. If they are, this Court has no jurisdiction; and the fact of their having property in this country cannot give them jurisdiction, though, possibly, it might be seized to enforce jurisdiction. The principle of *Evans* v. *The Dublin and Drogheda Railway Company* will govern this case. [*Parke*, B.—Is not this a Scotch and English Company? Several sections of the private Act contemplate that they may be sued in England, and, properly speaking, there is no distinction in Scotland between suits at law and in equity; would not service at Edinburgh have been sufficient in this case? There was a similar case here some time back, where there was a service on the secretary of a Scotch Insurance Company.] If such service would be sufficient, there would be nothing to prevent an English Company being sued in Scotland. The Uniformity of Process Act does not apply to a Scotch Company. It may be conceded, that the Company is liable to be served at Carlisle with respect to the purposes for which this Company is an English Company, but not further. [*Parke*, B.—Suppose an accident, through negligence, on the English part of the line, where would you serve the writ?] At the Carlisle office. [*Alderson*, B.—Might not the Company be sued here on a bill of exchange. *Platt*, B.—Or suppose the contract to convey be entered into on the English side of the line, and an accident through negligence to occur in Scotland, are the defendants only to be liable in the Scotch Courts?] It is submitted that they are. He cited *Pilbrow* v. *Pilbrow's Atmospheric Railway Company* (*a*).

PARKE, B.—It cannot be said, that this is not an English line for some purpose; and, if so, the writ has been properly served. The action arises out of an obligation imposed by statute upon the Company in both characters

(*a*) Ante, Vol. 4, p. 683; 3 C. B. 730.

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of an English and Scotch Company. It is unnecessary to decide whether, if this were exclusively a Scotch Company, the service would have been sufficient, for here the Company are authorised to construct their line from Carlisle to the Scottish border; and all contracts made by them are binding in their character of a Scotch and English corporation. Independently of this, the English and Scotch Clauses Consolidation Acts are incorporated with the Company's Act.

ALDERSON, B.—The last circumstance mentioned by my Brother *Parke* shews clearly that this is both a Scotch and English Company; and that, to my mind, gets rid of all difficulty.

PLATT, B.—Suppose half the line to be in England and half in Scotland, where is the Company to be sued if this objection is to prevail, for it affects both characters. I think the service is perfectly regular.

Rule discharged.

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Trinity Term, 1851.

June 17th. PARKER *v.* THE BRISTOL AND EXETER RAILWAY COMPANY.

The plaintiff, a carrier, sent goods by the defendants, to be carried on their line, as also on that of the Great Western, a continuous line; he objected to the charges as excessive, but paid the amount claimed; under protest, making no tender of any sum as a reasonable charge: —*Held*, that he was entitled to recover back the amount paid above what was a fair and reasonable charge in an action for money had and received, and that the whole sum so overpaid was recoverable against the defendants, though a portion of it was received by them as agents for the Great Western Railway Company.

DEBT for money had and received.—Plea, never indebted. The cause was tried before *Parke*, B., at the Middlesex Sittings in the present Term; when it appeared that the plaintiff was a carrier of goods on the Great Western and the Bristol and Exeter Railways, both of which lines were for many years worked by the Great Western Railway Company; but, at the period when the alleged causes of action arose, each line was worked by its own Company.

By the scale bill issued at the stations upon both lines, and purporting to refer to both, the rate of carriage for a certain class of goods was fixed at 2*l.* 6*s.* 3*d.* per ton from Paddington to Taunton, including the collection and delivery of the goods by the servants or agents of the respective Railway Companies. This bill intimated that an allowance of 2*s.* 6*d.* per ton for collection and delivery in London, and 1*s.* per ton for collection and delivery at Taunton, would be made to parties undertaking those duties themselves. The plaintiff was accustomed to collect and deliver goods on his own account. The respective Companies were by their Acts of Parliament bound to charge all persons equally under the same circumstances. The plaintiff demanded a larger scale of deduction than that stated and allowed in the scale bill, viz. 5*s.* a ton for collection and delivery in London, and 2*s.* 6*d.* for collection and delivery at Taunton. He invariably paid the amount demanded by the Company under protest. This action was brought to recover the amount of the alleged overcharges.

At the trial, it was insisted, on the part of the defendants, first, that the action would not lie; and secondly, that,

if it would, so much of the excess of payment as related to the carriage of the goods upon the line of the Great Western could not be recovered from the defendants, who acted as their agents. The learned Judge overruled these objections, and held that the plaintiff was entitled to maintain the action for such amount as the jury should think that he had overpaid, leave being reserved to the defendants to move to enter a nonsuit, or to reduce the damages. Thereupon the plaintiff had a verdict for 9*l.* 0*s.* 4*d.*

Kinglake, Serjt., now moved, June 14.—First, an action for money had and received will not lie. The payment was a voluntary one, and no reasonable sum was tendered. These circumstances distinguish the case from *Parker* v. *Great Western Railway Company* (*a*); the decision of which case is rested expressly on the ground that the payments were not voluntary. [*Parke*, B.—I acted at Nisi Prius on the authority of *Ashmole* v. *Wainwright* (*b*), in which the case of *Ashley* v. *Reynolds* (*c*) was fully considered; the Court there held that no tender was necessary, and that upon the carrier was the burthen of saying what the proper charges were. *Pollock*, C. B.—We are here bound by *Ashmole* v. *Wainwright*. It does, however, seem to me that that case cannot be supported on the authority of *Ashley* v. *Reynolds*.] In *Ashmole* v. *Wainwright* there was a clear refusal to deliver up the goods except on payment of the sum demanded.—Secondly, the plaintiff cannot recover back that portion of the over-payment charged in respect of the carriage between Paddington and Bristol which the defendants received as agents only: *Bamford* v. *Shuttleworth* (*d*). [*Parke*, B.—In *Snowden* v. *Davis* (*e*), Lord *Mansfield*, C.J., laid it down, that where money is paid by a

(*a*) Ante, Vol. 3, p. 563; 7 M. & Gr. 253.
(*b*) 2 Q. B. 837.
(*c*) 2 Str. 915.
(*d*) 11 A. & E. 926.
(*e*) 1 Taunt. 359.

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party, "under terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular," he who receives the money, though acting in the character of agent to a third person, is bound to refund. That principle was acted upon in *Atlee* v. *Backhouse* (*a*) and *Spry* v. *Emperor* (*b*). There is an implied undertaking on the part of him who receives money improperly, to return it. *Alderson*, B.—And in such case the agent may be treated as principal.]

Cur. adv. vult.

POLLOCK, C.B.—In this case, we are all of opinion that there ought to be no rule. The case of *Ashmole* v. *Wainwright* is a decisive authority, governing the present case; and we, therefore, think, that if any question is to be raised as to the correctness of the doctrine there laid down, it must be by appeal to a Court of Error; and I agree with the rest of the Court in refusing the rule upon the authority of that case. I must however express the opinion, which if I were in a Court of Error I should more freely express, that, although I now feel bound by the case, I regret the decision, for it seems to me to break in upon a broad intelligible principle, that the action for money had and received must be brought for a definite, clear, and certain sum, and not for some unknown sum, which is to depend upon the verdict of the jury, who are to decide whether the defendant has received the money or not. My Brother *Parke* wishes me to add, that the doubt belongs exclusively to my own mind, and not to that of the rest of the Court, who are satisfied with that decision, and altogether agree with it, not merely as a binding authority, but as agreeable to their own opinion and judgment. But, while I yield to that authority, I am not convinced by it; as I think the broad principle, that an action for money had and received must be brought for a clear and definite sum,

(*a*) 3 M. & W. 633. (*b*) M. & W. 639.

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is a principle which has prevailed I believe for many years in Westminster Hall, and is, I think, worth preserving.

The other point was, that that part of the money which was received by the defendants, not as principals but as agents, is not recoverable from them. But the case of *Snowden* v. *Davis* clearly lays it down, that an action for money had and received lies to recover back money which has been obtained through compulsion, even although it has been received by an agent who acted for his principal. That, therefore, disposes of the second point, on which we entertain no doubt. There will therefore be no rule.

Rule refused.

Hilary Term, 1851.

Jan. 22*nd.*

SADD *v.* THE MALDON, WITHAM, AND BRAINTREE RAILWAY COMPANY.

A Railway Company, empowered by Act of Parliament to construct "a Railway and works," within certain limits as to space and time, is authorised, under the 16th section of the Railways Clauses Consolidation Act, within such limits, without the consent of the owner, to take land for the purpose of constructing the various works mentioned in that section, although the line be opened, and the works be not necessary, but only convenient for the purposes of the line.

THIS was a special case, stated for the opinion of this Court by an order of *Patteson*, J.

The defendants were a Company, incorporated by the 9 & 10 Vict. c. lii., by which they were empowered to make and maintain a railway, to be called "The Maldon, Witham, and Braintree Railway;" and in pursuance of such powers, they constructed the line, and opened it for public traffic on the 1st of October, 1848. But at that time the station at the Maldon Terminus, and the works and conveniences connected therewith, were in an unfinished state, and were not completed. On the deposited plan, a parliamentary centre of the line was delineated, and on each side of it certain limits of deviation were marked out. The Company constructed their line to the left of the parliamentary centre of the line marked on the plan, but within the limits of deviation.

The plaintiff was seised in fee of a wharf on the river Blackwater, and was also the lessee of a strip of land, both

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of which were within the limits of deviation. Prior to the 1st of October, 1848, the defendants had commenced, and they afterwards proceeded to complete, the station and works at the Maldon Terminus; and for that purpose they laid down sidings and additional lines for the convenient working of the railway; and in September, 1848, they commenced making, and afterwards, and after the 1st of October, 1848, but within the time limited for the execution of their powers, without the consent of the plaintiff, proceeded to construct, and laid down and constructed, a line of rails, and the works necessary for supporting and carrying the same through the said two pieces of land and communicating with the said river, for the purpose of facilitating the communication between the river and the railway and station, and for the purpose of receiving, depositing, loading, and unloading goods to be carried upon the railway, and for the more convenient using and working of the same; which said last-mentioned line of rails was also within the limits of deviation shewn on the said deposited plans.

Before taking possession of or interfering with any part of the said two pieces of land for the purposes of the said works, the defendants observed all such matters as are required by the 8 & 9 Vict. c. 18, to authorise an entry on and taking by a Railway Company, under the 85th section, of lands which they have the power to purchase compulsorily; and they did no unnecessary damage in the construction of the works.

The plaintiff contended, that the Company were not authorised to take any part of the said two pieces of land without his consent, for the purposes aforesaid. The defendants contended, that it was one of the works and conveniences authorised by the Acts to be made, within the prescribed limits of deviation; and that they were entitled to take the same without the plaintiff's consent, under the compulsory clauses of the statutes.

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The question for the opinion of the Court was, whether the defendants were justified, under the powers of the special Act and the 8 & 9 Vict. c. 20, incorporated therewith, in constructing the said works through the said two pieces of land without the plaintiff's consent. If the Court should be of opinion that they were not, judgment by confession was to be entered, damages 10*l.*; if otherwise, a nolle prosequi was to be entered.

Bramwell for the plaintiff.—The defendants were not entitled to take the plaintiff's land without his consent. By the 20th section of their Act, 9 & 10 Vict. c. lii., which, by sect. 1, incorporates the provisions of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, "it shall be lawful for the Company to make and maintain the railway and works in the line and upon the lands delineated on the plans, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose." And, by the 24th section, "the quantity of land to be taken by the Company for extraordinary purposes shall not exceed twenty acres." Now, although the Company may take any land, and without limit as to quantity, which may be found necessary for the construction of their line, by compulsion, they are not empowered to take any land for the purposes of convenience, without having first obtained the consent of the owner of the land. They might, no doubt, have taken this land in the first instance for the construction of their railway. The defendants' case, therefore, must rest on the 45th section of the 8 & 9 Vict. c. 20. There is a distinction between works necessary and convenient. Lord Chancellor *Cottenham*, in *Cother* v. *The Midland Railway Company* (*a*), says:—"I consider that all land authorised to be taken as necessary, in the terms of the Act, for the purpose of making and maintaining the railway and works,

(*a*) Ante, Vol. 5, p. 187; 2 Ph. 469.

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is liable to be so taken, whether necessary for the actual line of the railway, or for stations or other conveniences necessary for the working of the railway." [*Parke*, B.—The land is within the limits of deviation; why may not the Company take it, if it be done within the prescribed time?] Because the Company are only empowered to make the line; and, having once fixed its course, they were not authorised to alter it.

Bovill contrà.—The defendants do not rely on the 45th section of the Railways Clauses Consolidation Act; but on the 16th section, which enacts that, "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works: (that is to say), they may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;" so that the Company are empowered to take the land by compulsion, if they shall think it necessary for a permanent way.—He cited *Beardmer* v. *London and North Western Railway Company* (*a*), *The Attorney-General* v. *Eastern Counties Railway Company* (*b*), and *Priestley* v. *Manchester and Leeds Railway Company* (*c*). He was then stopped by the Court.

Bramwell in reply.

(*a*) Ante, Vol. 5, p. 782; 1 Mac. & G. 112.

(*b*) Ante, Vol. 3, p. 337; 10 M. & W. 263.

(*c*) Ante, Vol. 2, p. 134; 4 Y. & C. 63.

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POLLOCK, C. B.—The defendants are entitled to the judgment of the Court. The simple question is, whether, looking at the maps and plans which have been properly deposited, the notices given, and the fact of the general Act being incorporated with the special Act of the Company, the defendants were entitled to make a communication between the terminus of their line and any part of the river Blackwater, within the limits of deviation as marked in the plans. The 16th section of the general Act explains the meaning of the word "works." Now, under the language of that section, the Company alone are to be the judges of the propriety of the works which they propose to execute for their line. If they act in an unjust and arbitrary manner, as, by taking land with a view to favour the business of one man's wharf in preference to that of another, or to injure that of another without any regard to public convenience, it may be that they would be restrained from pursuing such a course of proceeding by a Court of Equity; but we have nothing to do with that question, and have merely to decide whether the defendants were entitled to do what they have done. It appears to me, that, under these Acts of Parliament, they were so entitled; for they are within the limit as to time, which extends the period to three years, and they are within the prescribed limits of deviation as to space; they were consequently enabled to make any of the works of this description they might think necessary or proper for the use and benefit of the line. The distinction attempted to be made by the learned counsel for the plaintiff between works of necessity and works of convenience, as it seems to me, has no existence in the Act, and consequently cannot be supported. The defendants are at liberty to take certain lands within the 16th section; and as they have complied with the provisions of the Acts of Parliament with respect to the restrictions of time and

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space, they are entitled to take the land in question under that section of the general Act.

PARKE, B.—I am of the same opinion. If there had been no such section in the Act as the 16th, a question might have arisen as to the power of the defendants to take this land; and I do not give any opinion as to what their power would have been irrespective of that section. But, under that section, I have no doubt that the defendants were authorised to make this communication with the river; they had not exhausted all the powers given them by the Act, and they had not finished all their works. I therefore think that it is impossible to say that they had not the power of taking this land, for they are within the limitations, both as to time and space, imposed on them by the Acts of Parliament. Then, with respect to the 45th section, I am of opinion that it does not apply to this case, but has reference to such lands wanted for additional conveniences only as land-owners may be willing to sell them, and which lie beyond the limits of deviation, the amount being limited, under the special Act, to the extent of twenty acres. That section does not control the 16th section; nor is the point at all affected by the judgment of Lord *Cottenham* in *Cother* v. *The Midland Railway Company.*

ALDERSON, B.—If the special Act and the Railways Clauses Consolidation Act are read together, the case is quite free from doubt. The 20th section of the 9 & 10 Vict. c. lii. empowers the Company to make "a railway and works," but does not define what is meant by those words. They are, however, defined by the 8 & 9 Vict. c. 20, s. 16. That section gives the Company the power, amongst other things, of making a permanent way. This is a permanent way connected with the line which the Company have thought proper to construct; and they have obeyed

the provisions of their Act, with reference to the limits of both time and space. The Company having a distinct authority to construct this portion of their line, they may therefore take and use the land within the proper limits.

Judgment for the defendants.

THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY *v.* FIELDEN.

Jan. 25th.

An Irish Railway Company, carrying on business at Westminster, was compelled to give security for costs, though it had personal property in England, and most of its shareholders resided there.

THIS was a rule calling on the plaintiffs to shew cause why the proceedings in this action should not be stayed until they should give security for costs.

It appeared from the affidavits on which the rule was obtained, that the action was brought to recover the amount of certain calls made on the defendant's testator in his lifetime, in respect of shares held by him in the Kilkenny and Great Southern and Western Railway Company; that the Company was incorporated by the 9 & 10 Vict. c. ccclx. for making a Railway from Kilkenny in Ireland, to join the Great Southern and Western Railway at or near Cuddagh in Ireland; and that the property and effects of the Company were wholly out of the jurisdiction of the Court. The plaintiffs' affidavit stated, that the office of the Company was at Westminster, where the business of the Company was transacted and their register and books kept; that there was no property or effects of the Company in Ireland, or elsewhere out of the jurisdiction of the Court, but that all the property and effects of the Company were in England; that the capital of the Company was divided into 11,250 shares of 20*l.* each, which were held by 276 shareholders; that at least four-fifths of the shareholders were permanently resident in England;

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that none of the shareholders, except three, had paid up more than 2*l.* 10*s.* per share; and that the said four-fifths of the shareholders were responsible to the extent of their capital not paid up; and that several had property and effects in England more than sufficient to pay the amount of their capital. *Platt*, B., at Chambers, refused to make the order.

Watson and *Willes* shewed cause, citing *The Limerick and Waterford Railway Company* v. *Fraser* (*a*), Arch. Prac. 1230, 8th ed.; *M'Connell* v. *Johnston* (*b*), *Orr* v. *Bowles* (*c*), *Anon.* (*d*), *Devereux* v. *The Kilkenny Railway Company* (*e*), *Huchings* v. *The Kilkenny Railway Company* (*f*).

J. A. Russell, in support of the rule, relied upon *The Edinburgh and Leith Railway Company* v. *Dawson* (*g*).

POLLOCK, C. B.—This rule must be made absolute. It is desirable, as far as possible, that the rules of practice should be simple and uniform; although, from the various questions which arise out of the fluctuating transactions of life, and the continual changes in the law by Parliament, it becomes difficult to preserve the simplicity and certainty desirable. In this case, however, there is one clear rule, namely, that persons out of the jurisdiction, whether individuals or a corporation, suing in the Courts here, must give security for costs, unless they have real property in this country, or at least property of a permanent nature, for personal property is insufficient. Then is this Company a foreign corporation? I think it is. It is proposed to answer the application, by saying that there

(*a*) 4 Bing. 394.
(*b*) 1 East, 431.
(*c*) 1 Hodges, 23.
(*d*) 2 C. & J. 88.
(*e*) 5 Exch. 834.
(*f*) 1 L. M. & P. 712.
(*g*) 7 Dowl. 573.

are shareholders resident in England who would be liable to costs, since they have not paid up the full amount of their calls. It is, however, by no means certain in what way they may be rendered liable: whether, if there were no effects in Ireland, the parties might be proceeded against at once in this country; or whether it would be necessary to sue the Company in Ireland, for the purpose of ascertaining whether or no they have any effects there. The very circumstance of the construction of this Act of Parliament being doubtful, is sufficient, in my judgment, to induce us to say, that, by the general practice of the Court, security for costs is required; and that, if an exception is to be introduced, it must be perfectly clear, and capable of easy application. My present impression is, to construe the Act of Parliament as adverse to what is urged being any answer to the application. I think that the defendant could not proceed against the shareholders in England without first endeavouring to make the judgment available in Ireland. But, if proceedings are taken against those who are security for costs, the defendant has only to prove the amount of costs; whereas, if the shareholders are to be considered in the light of sureties, as against them the defendant must prove that they are shareholders, of which the return to the Stamp Office is only primâ facie evidence; and it is open to the parties whose names appear, to shew that there is some mistake, and that in point of fact they are not shareholders. It appears to me far better to abide by the general rule; and that, if any exception is to be engrafted on it, it must be free from doubt.

PARKE, B.—This Company being an Irish corporation, we must consider it on the same footing as an individual resident in Ireland. For that, the case of *The Limerick and Waterford Railway Company* v. *Fraser* is an authority. Then, can we refuse to compel an Irish corporation to give security for costs, because some of its shareholders

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reside in this country, from whom the defendant may by possibility obtain his costs. The cases establish, that, in order to prevent the operation of the general rule, it is not enough to shew, that, at the time of the application, the plaintiff has personal property in this country sufficient to satisfy the costs, because such property is of a fluctuating nature, and might not be available when judgment was obtained. That is the ground upon which my Brother *Patteson* decided the case of *The Edinburgh and Leith Railway Company* v. *Dawson*, where he held, that the fact of a foreign Company having money and Exchequer bills in England was no answer to an application like the present, although the 1 & 2 Vict. c. 110 gives a remedy against that description of property. The only exceptions to the rule are, where one of several plaintiffs resides in this country, or where there is real estate here. The question therefore is, whether, as the Companies Clauses Consolidation Act gives a contingent remedy against some of the shareholders, that is to be considered as equivalent to real estate, within the meaning of this rule. I think it cannot. There would be difficulty in enforcing the remedy, since an application to the Court would be necessary for that purpose; and it must be shewn that all due pains have been taken to obtain satisfaction from the Irish property before the Court would grant execution here. That was decided in *Devereux* v. *The Kilkenny Railway Company*. I think, therefore, that we must treat this Company as an Irish individual; and that the fact of some of the shareholders being resident here is no sufficient reason to take the case out of the general rule.

ALDERSON, B.—I agree with the rest of the Court. Matters like these, which, in truth, arise out of the discretion of the Court, must be acted on and dealt with in the exercise of a reasonable discretion. A plaintiff is compelled to give security for costs because he cannot be fixed by the

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direct process of the Court. That can be done when one of several plaintiffs is resident in England, because he may be taken in execution, and so there is a personal responsibility to the defendant; it cannot be done where all the plaintiffs reside abroad; but the case is brought as near as possible to it by compelling them to find some one here to enter into a bond to pay costs. This is the case of a foreign partnership suing here; but then it is said, that of this foreign partnership there are certain persons resident in England, who, by a certain process, may be made responsible for costs. That process is exceedingly complicated and doubtful; and as each shareholder is only responsible to a limited extent, numerous applications to the Court might be necessary before it could be rendered available. Therefore, it seems to me that it would be an unreasonable exercise of the discretion of the Court, to substitute for a bond and direct covenant something which is extremely indirect, doubtful, and inconvenient; and that the Court most properly exercises its discretion by compelling the plaintiffs to give security for costs.

PLATT, B.—I am of the same opinion, and think that I was wrong in refusing to make the order at Chambers. The Lord Chief Baron has put the matter on the true ground, namely, that the rules of practice should be clear and uniform. Here a foreign Company is suing, and if it could be made plain, that, in the event of judgment against them, the defendant would get his costs, there would be no pretence for this application. But the remedy suggested is of a complicated character, and uncertain in its results; for although a proceeding by scire facias is in fact a continuation of the suit, yet it has all the incidents belonging to a suit itself, besides the contingency of its not being allowed; for the party must satisfy the Court that he is entitled to it before he can take that proceeding, and then he may be called upon to prove the whole case by

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issues raised by his adversary. Taking all these circumstances into consideration, it appears to me, that security for costs should be given.

Rule absolute.

Jan. 29th.

HOMERSHAM *v.* THE WOLVERHAMPTON WATERWORKS COMPANY.

A public Company, incorporated by Act of Parliament, entered into a contract under seal with the plaintiff, for the execution of certain works according to the terms of a specification, which also contained provisions for extra work. He entered upon the work under the superintendence of the Company's engineer, and with his approbation executed certain extra works not coming within the provisions of the contract under seal. The work being finished the plaintiff made a claim upon the Company to a large amount, and the directors paid him a sum on account. By sect. 97 of the Companies Clauses Consolidation Act, the directors are empowered to make parol contracts, without the same being reduced into writing, where such contracts would, if entered into between private persons, be valid; and, by the 98th section, the directors are bound to enter minutes of such contracts in a book, and, by one of the clauses of the special Act of the Company, three directors constitute a quorum:—*Held*, in an action for the extra work, that the mere fact of the work being done was not sufficient, in the absence of any order of directors, or anything from which a parol contract could be inferred, such as would bind the Company; and that there was no evidence for the jury of liability on the part of the defendants.

DEBT for goods sold and delivered, for work and labour, money paid, and on an account stated. Plea, never indebted.

The cause was tried before *Pollock*, C. B., at the Middlesex Sittings after last Michaelmas Term, when it appeared that the defendants were incorporated by the 8 & 9 Vict. c. cxxxv.; and that a contract under seal had been duly made between the plaintiff and the Company for the supply by the plaintiff of certain pumps, engines, and machinery, according to the terms of a specification, which also contained certain provisions with respect to extra work. The work contracted for was executed, and also much additional work, but which could not be considered as falling within the provisions of the contract under seal. The additional work was executed under the directions and with the approval of the standing engineer of the Company. Certain disputes having arisen between the plaintiff and the defendants, the plaintiff sent in a claim for the extra

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work, for a considerable sum beyond that stipulated for by the contract. A sum of 1000*l.* was thereupon paid to the plaintiff by the defendants on account; it was not, however, shewn to have been paid by the order of three directors. It was thereupon objected, on the part of the defendants, that the Company could be bound only by an express contract under seal, or by a contract which complied with the requisites of the 8th section of their Act, which required three directors to constitute a quorum; and that there was no evidence of any implied contract, even if there could be an implied contract binding on the Company. The learned Judge was of that opinion, and nonsuited the plaintiff, reserving leave to him to move to set aside the nonsuit and to enter a verdict for him.

Jan. 16*th.*

Sir *F. Thesiger* now moved.—There was some evidence to warrant the jury in finding the defendants liable for the extra work executed upon their property and for their benefit. This case falls within the exception laid down in *The Mayor of Ludlow* v. *Charlton* (*a*), and in *Paine* v. *The Strand Union* (*b*). The 97th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16 (*c*), empowers the directors or committee to contract by parol and without writing, where such contract, if made between private

(*a*) 6 M. & W. 815.

(*b*) 8 Q. B. 326.

(*c*) Which enacts, "That the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the Company, may lawfully be exercised as follows:—With respect to any contract, which, if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the Company, in writing, and under the common seal of the Company, and in the same manner may vary or discharge the same. With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on behalf of the Company in writing, signed by such committee or any two of them, or any two of the directors,

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parties, would be valid. [*Parke*, B.—That section seems to mean that the contract is to be an express contract, entered into at a meeting.] If so, the payment of the sum of 1000*l.* by the directors on account was a recognition of the contract, and was equivalent to an express contract, or was evidence from which such a contract might be implied: *Burn* v. *Miller* (*a*), *Cooke* v. *Munstone* (*b*). The work was done for the benefit of the Company, and under the superintendence of their engineer, who must be considered as the agent of the Company; and the contract was recognised by the payment on account. [*Alderson*, B.—The money was not paid by three directors. *Parke*, B.—The payment by the proper number of directors at a meeting, if such were the fact, would only admit the liability of the Company upon some contract to the extent of the sum paid, and would be referable to the contract under seal. The payment, therefore, does not operate as a recognition on the part of the defendants of the particular work for which the plaintiff seeks to recover. And, as to the argument that the Company has received the benefit of the work, if it were held good, a corporation would be liable for work done upon their property at the request of a stranger. In the case of *The Mayor of Ludlow* v. *Charlton* (*c*), *Rolfe*, B., in delivering the judgment

and in the same manner may vary or discharge the same. With respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the Company by parol only, without writing, and in the same manner may vary or discharge the same. And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the Company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the Company or any other party thereto, such actions or suits may be brought, either by or against the Company, as might be brought had the same contracts been made between private persons only."

(*a*) 4 Taunt. 748.

(*b*) 1 Bos. & P. N. R. 351.

(*c*) 6 M. & W. 815.

of the Court, points out the true grounds upon which the corporate seal is required to be affixed to contracts for the purpose of binding the corporation, being principally for the protection of the interests of the individual members of the corporation. And for this reason, a contract, to be binding upon a corporation, is required to be entered into in a specific manner. *Martin*, B., referred to *Diggle* v. *The London and Blackwall Railway Company* (*a*).] Here however a contract, good as between private individuals, would bind the Company. [*Alderson*, B.—By the 98th section of the 8 & 9 Vict. c. 16, the directors are bound to enter notes, minutes, or copies of all contracts made by them in a book; by which it seems that there must be an express contract.]

Cur. adv. vult.

POLLOCK, C. B.—The application in this case was made on the ground that there was evidence to go to the jury of a new contract, made apart from and independent of the contract under seal. The action was not founded on the contract under seal, but was an action of debt for work done and materials provided. In point of fact, a contract under seal had been executed between the plaintiff and the Company; and there is no reason to doubt that the plaintiff performed a great many other works that were not included in the contract, but which were to be considered as extras. There was, however, no evidence of any other contract that would bind the Company. It was contended, that, under the 97th section of the 8 & 9 Vict. c. 16, the Company might be bound, not merely by a contract under seal, but by a contract made by three directors. But, upon the facts it turned out that there had been no meeting of three directors at which any order had been given. And though we are of opinion,

(*a*) Ante, p. 590; 5 Exch. 442.

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that, under that section, three directors are competent to bind the Company, we think that the mere fact of work being done is not sufficient, in the absence of any order of the directors, or anything from which a parol contract can be inferred, such as would bind the Company; for the Company is not bound by the mere order of the engineer, or by the contract with one director. That being the state of things, it was proposed to prove that three of the directors had adopted the contract, that is, adopted the works as they stood and had been performed, by a payment of 1000*l.* on account after the bill had been delivered, and after the works were made the subject of a claim against the Company. It was contended, that the payment of this money was such a recognition of the claim, and such an adoption of the work having been done for the Company, that the defendants were bound by the contract. But without saying what would have been the effect of such a payment if it had been proved—and, speaking for myself, I feel considerable doubt about it, in which doubt other members of the Court I believe participate—it is sufficient for the present purpose to say, that there was no evidence of any such payment upon that account. The payment was made in pursuance of a resolution in writing; and an attempt was made to prove what that was, but no notice had been given to produce the books, nor had any witness been called on a subpœna duces tecum; and the attempt to prove the payment of that money legitimately, as the act of three of the directors, undoubtedly wholly failed. The case, therefore, stands precisely in this position:—that there was a contract under seal; that there was more work done than the plaintiff was bound to perform under that contract; but that there was no evidence of the extra work having been either ordered by the Company, or sanctioned, ratified, or adopted by them. These clauses of restriction are of the same nature as the old common law distinction between a corporate body and

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a private individual, according to which the latter can in general be bound only by a contract under seal; and the rule is for the benefit of subscribers to works of this description, for the protection of their interests. We are, therefore, of opinion, that either they can only contract under seal, if they are a corporation, or, if they are a body established under any special or general Act of Parliament, they can only contract according to the terms by which the contract is authorised to be entered into by the clause of the special Act, or of the general Act by which they are controlled. In the present case, there was no evidence of any contract which could be brought under either of these classes; and, therefore, we think the manner in which the case was disposed of at the trial was perfectly correct, and that there is no ground for granting a rule to shew cause why a different result should not be obtained.

Rule refused.

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Nov. 14*th.*

TRESPASS for assault and false imprisonment.—Plea, not guilty, and issue thereon.

The plaintiff became a passenger by the defendants' railway, and took his ticket from Monk's

The cause was tried before *Maule*, J., at the Chester Spring Assizes, 1851, when it appeared that the plaintiff

Ferry to Bangor and back. The defendants' line extends from Monks Ferry to Chester, and the Chester and Holyhead Railway continues the line to Bangor. On the plaintiff's return at Chester, the ticket collector demanded 2*s.* 6*d.* extra, which the plaintiff refused to pay; he was thereupon taken into custody by a railway servant, under the direction of a superintendant, to the police station, where he paid the money under protest, and was released. The Chester station is occupied by the defendants and by other Railway Companies; one of the witnesses stated, that he believed the person who took the plaintiff into custody was a servant of the defendants. The plaintiff's attorney having written to the secretary of the defendants for compensation, received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. He afterwards stated, that it was an awkward business, and that the blame would fall upon the station-clerk; he also offered to repay to the plaintiff's attorney the sum of 2*s.* 6*d.* which had been over paid. This was refused, and he thereupon saw the plaintiff on the subject:—*Held*, in an action against the defendants for the arrest, that there was no evidence of authority for the arrest or of subsequent ratification by them, and that they were not liable in the action.

Whether the letter of the secretary was admissible in evidence against the defendants—*Quære.*

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and a Mr. Uffell, in July, 1849, took two excursion tickets at the defendants' station, Monks Ferry, for Bangor and back; on taking their tickets they inquired of the clerk at the Monks Ferry station if they could return by the half-past seven o'clock train from Bangor, who informed them that they could. They paid 6*s.* 6*d.* each for their tickets, and proceeded by the excursion train to Bangor, viâ Chester. The defendants' line terminates at Chester, and there the Chester and Holyhead line continues it to Bangor. They returned by the half-past seven o'clock train from Bangor, and on arriving at the platform, within a short distance from the Chester station on the Chester and Holyhead line, they were told by a person of the name of Phillips, in railway livery, who collected the tickets, that they must pay 2*s.* 6*d.* each more before they could proceed to Birkenhead, as they had returned by the wrong train. This they refused; they were thereupon told, that they must see "the superintendant" at the station; and Phillips said, he would go and speak to him. On the arrival of the train at the station they were given into the custody of a police officer, and escorted through the streets of Chester to the police station. There they were advised to pay the extra fare, 5*s.*, under protest, which they accordingly did. The Chester is a joint station of the defendants' line and three other Companies, and the staff of officers is provided at their joint expense. The witness Uffell stated, that he believed Phillips to be one of the servants of the defendants' Company, and to be still in their service. The plaintiff, by his attorney, applied to the secretary of the defendants' Company, Mr. Gibson, by letter as follows:—

"Some few days since a Mr. Roe and a friend applied at the Birkenhead station for an excursion ticket to Bangor, and at the same time inquired of the person who handed them the ticket and took the money, what train they could return by; when they were informed that they could re-

turn by the last train, which left Bangor at half-past seven; and by that train they did return to Chester; but on their arrival there, it appears a sum of 2*s.* 6*d.* each was demanded from them, which they refused to pay. The consequence was, they were ordered to be detained, and taken before a magistrate; by this proceeding they were compelled, after paying the 2*s.* 6*d.* each, to remain in Chester all night.

"Unless reparation is made them for the detention and expenses occasioned therein, I am instructed to take proceedings."

To which the secretary replied.

"Sir,—I am in receipt of your letter of the 3rd instant, and will thank you to give me the date on which the demand was made on Mr. Roe and his friend at Chester, when I will make the necessary inquiry."

The reception of this letter was objected to, on the ground that the secretary was not authorised to answer such a demand; and that it was not evidence against the Company, without evidence of authority from them. The learned Judge, however, received it.—The secretary afterwards called upon the attorney of the plaintiff, and stated that it was an awkward affair, and that the blame would fall upon the young man at Monks Ferry, for giving the plaintiff the wrong information, and offered to repay the 5*s.*; this was declined: he then proposed to see the plaintiff, to which the attorney assented, and he thereupon saw him.

Upon this state of facts, it was objected, that there was no evidence that the defendants had authorised the plaintiff's arrest. The learned Judge declined to nonsuit, and the plaintiff had a verdict for 50*l.*; leave being reserved to the defendants to move to enter a nonsuit.

Welsby having obtained a rule nisi accordingly,

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Chilton, *Knowles*, and *E. Beavan* shewed cause.—There was some evidence that the arrest of the plaintiff was authorised by the defendants, they having contracted to convey the plaintiff from Monks Ferry to Bangor and back. It must be assumed that the Company had dominion over the whole of the lines upon which the plaintiff was carried, that they had in their own employment servants duly authorised to take the tickets of the passengers, and that the sum demanded was taken on their behalf. Phillips and the other servant were in railway uniform, and received the tickets in the usual course of business, and on the defendants' behalf; there was therefore some evidence that they were the defendants' servants, and were acting under their authority. The money paid by the plaintiff was taken on behalf of the defendants, and came into their hands, the secretary having offered to restore it; besides, the Company had never repudiated the act of Phillips, and so the case was brought within *Glynn* v. *Houston* (*a*). The request by the secretary to see the plaintiff on the refusal to take the 5*s*., shews that the Company sanctioned the act of Phillips, the object being to effect a compromise with him. They also contended, that, on the ground of public policy, the defendants ought to be held liable: they cited *Blakemore* v. *Glamorganshire Canal Company* (*b*), *Smith* v. *Birmingham and Staffordshire Gas Light Company* (*c*), and *Buron* v. *Denman* (*d*).

Welsby and *T. Jones*, in support of the rule, were not called upon.

POLLOCK, C. B.—I am of opinion that this rule must be made absolute. Assuming that the evidence objected to was properly received, namely, the letter on the part of

(*a*) 2 M. & G. 337.
(*b*) 2 Cr. M. & R. 133.
(*c*) 1 A. & E. 526.
(*d*) 2 Exch. 167.

the plaintiff to the secretary of the Company and that in answer, which I think they were, it does not follow that we are at liberty to draw the inference that the arrest was authorised by the Company, but merely that the letter was written by the secretary of the Company on their behalf, in answer to the plaintiff's application. It appears to me, however, that the facts of the case, taken in conjunction with the letters, do not afford any evidence whatever to justify us in saying, that the defendants authorised or sanctioned, or that they are in any way liable for, the act of which the plaintiff in the present action complains. I certainly regret that such is the result of our decision. But we must administer the law, not merely as between the public and a Railway Company, but upon the broad principles which govern the relation between principal and agent, and master and servant. The rule is the same between a private individual and a Railway Company, as it is where the same matter is in dispute between two private individuals. The general rule is, that a master is not liable for the tortious act of his servant, unless that act be done either by an authority, express or implied, given him for that purpose by the master. If it had appeared in the present case that the act complained of was one which the Company had legal authority to perform, the act would not have been tortious, and it might well have been put to the jury as having been done by an authority given by the Company. But there was no evidence whatever that the act was of that character; and as the case stands, we must take it to be a tortious act. It therefore follows that the plaintiff was bound to shew that the person by whom he was arrested was not only the servant of the Company, but also that he had their authority to arrest him. Now I think, that although there may have been some evidence that Phillips was in the service of the Company, there was no evidence that he had any previous authority from the Company to take the plaintiff

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into custody. And I think the correspondence does not carry the case any further; so that there is also an absence of all evidence of their having ratified the act. Taking, therefore, into consideration all the facts of the case, it appears to me that there is no evidence whatever upon which to found the liability of the Company. And I am of opinion that a nonsuit ought to be entered.

PARKE, B.—I am of the same opinion. The arrest not having been effected by the defendants themselves but by a third party, in order to render them liable, the plaintiff was bound to shew that the act of which he complained was by an authority, express or implied, given by the defendants, or that it had been subsequently ratified by them. I doubt whether there was any evidence whatever that Phillips was a servant of the Company; but assuming that there was such evidence, still there was no proof that he had ever received any general authority from the Company to arrest any person who did not pay his fare; nor was there any evidence of any course of proceeding to shew, that, as a servant of the Company, he was authorised to make any arrest on their behalf, much less that he had any direct authority to take the plaintiff into custody. The case is therefore resolved into the question, whether there was any recognition of the act by the Company; and I am clearly of opinion, that there was not. The letter of the secretary (admitting that it was properly received in evidence,) has reference merely to a compromise; it does not lead to the inference that the act done by the servant of the Company is to be taken as binding upon them; and no subsequent ratification can be implied from the terms of the correspondence between the parties. If we consider all the proceedings subsequent to the arrest, they merely go to shew that the matter arose entirely from a mistake of the clerk at the station, who upon taking the plaintiff's money incorrectly informed him that

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he might return by the evening train. The conversation does not shew that the arrest was authorised by the Company. I agree with what has been said by my Lord Chief Baron, that the same rule must be applied to Railway Companies as to individuals; and that we ought not to stretch the law against these bodies, merely because they perhaps may be considered better able than private individuals to pay for injuries done by their servants.

ALDERSON, B.—I am of the same opinion. I entertain great doubts whether there is any evidence that the officer who arrested the plaintiff was a servant of the defendants, as it appears that the station at Chester is not in the occupation of the defendants alone, but in that of several other Companies; and if this evidence is sufficient to substantiate that fact as against the defendants, it is equally so as against any of the other Companies. I do not see how it can be said that he was the servant of the defendants.

Rule absolute (*a*).

(*a*) See *Eastern Counties Railway Company* v. *Broom*, ante, p. 743; 6 Exch. 314.

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Michaelmas Vacation, 1851.

Dec. 2nd. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* THE EAST LANCASHIRE RAILWAY COMPANY.

DEBT for tolls and duties payable in respect of the passage and conveyance of steam engines, trucks, carriages, and wagons, of the defendants, and of divers persons, goods, chattels, and merchandise along a certain railway of the plaintiffs.

Plea, payment into Court.

The cause was tried before *Wightman*, J., at the Liver-

It was agreed between The Manchester, Bolton, and Bury Railway Company, and The Bury and Rossendale Railway Company, "first, that they would mutually concur, at the expense of the latter Company, in obtaining an Act of Parliament for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall; secondly, that the Bury and Rossendale Railway Company should have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it should be referred in the usual way, should determine; thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines or any portions thereof,) between Salford and Rawtenstall, or any points intermediate to these, should be carried on, as respects engine power and carriages, clerks and porters, and all other expenses (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who should pay to the Manchester and Bolton Railway Company, for the use of their railway, and in respect to the traffic therein specified, a pro ratâ proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic: with a proviso, that nothing therein contained nor elsewhere provided, should authorise the Manchester and Bolton Railway Company to receive, for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway at Salford; nevertheless the Manchester and Bolton Railway Company should be entitled to charge, for the use of such portion of their railway, for a length of two miles at the least. After the making of this agreement, the Manchester, Bolton, and Bury Railway Company was incorporated with the Manchester and Leeds Railway Company, and afterwards became "The Lancashire and Yorkshire Railway Company;" and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company;" and ultimately "The East Lancashire Railway Company;" and by subsequent Acts of Parliament, certain other railways became incorporated with it. A special verdict having found that the length of the Manchester, Bolton, and Bury Railway, from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway at Clifton, was four miles and no more:—*Held*, on the construction of the above agreement, first, that the plaintiffs were not entitled to charge the defendants that proportion for the whole amount received as tolls, which the whole distance of two miles to be charged on this part bore to the whole distance travelled on the line of the defendants alone; but that the rate per mile for the charge was first to be settled by the relative distances actually travelled on each; and, when so settled, a distance of two miles was to be paid for at that rate; and, secondly, that the agreement was limited to the traffic along the Bury and Rossendale Railway, and was not extended by the subsequent Acts of Parliament.

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pool Summer Assizes, 1849, when the following special verdict was found.

By the 6 & 7 Will. 4, c. cxi., for making a railway from Manchester to Leeds, certain persons were incorporated by the name of "The Manchester and Leeds Railway Company," which Act was altered and amended by divers subsequent Acts; and by the 10 & 11 Vict. c. clxiii., the name of the Company was changed to that of "The Lancashire and Yorkshire Railway Company," the plaintiffs in this action. By the 7 & 8 Vict. c. lx., for making a railway from the Manchester and Bolton Railway, in the parish of Eccles, to the parish of Whalley, all in the county palatine of Lancaster, certain persons were incorporated by the name of "The Manchester, Bury, and Rossendale Railway Company;" which name was by the 9 & 10 Vict. c. ci., changed to "The East Lancashire Railway Company," the now defendants. By the 1 & 2 Will. 4, c. lx., intituled "An Act to enable the Company of Proprietors of the Canal Navigation from Manchester to Bolton and to Bury to make a Railway from Manchester to Bolton and to Bury, in the County Palatine of Lancaster, upon or near the Line of that Canal Navigation, and to make a collateral Branch to communicate therewith, afterwards known and cited in Acts of Parliament by the short title of 'The Manchester, Bolton, and Bury Canal and Railway Act, 1831,'" certain persons were incorporated by the name of "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway;" and were thereby authorised (inter alia) to make a railway or railways, with proper works and conveniences connected therewith, for the passage of wagons and other carriages properly constructed, commencing from the river Irwell, in the township of Salford, in the county aforesaid, and extending and passing through Clifton and other places in the said county, and terminating in the town of Bolton in that county; and were thereby authorised to receive certain rates, tolls,

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and duties for and in respect of passengers and goods passing over the last-mentioned railway or any part thereof; and in case of refusal or neglect of payment thereof, to sue for and recover the same by an action of debt in any of her Majesty's Courts of record. This statute was amended by the statute 2 Will. 4, intituled "An Act to enable the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway to alter some Parts of the said Canal Navigation, to alter and amend the Line of the said Railway, to make further collateral Branches thereto, and for amending the Powers and Provisions of the Act relating to the said Canal and Railway;" and also by two other Acts passed in the 5 Will. 4 and 1 Vict. respectively. The railway thus authorised to be constructed from the river Irwell through Clifton to Bolton, with divers works connected therewith, was accordingly constructed by the Company so incorporated by the name of "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway;" and which last-mentioned railway was commonly called and known and mentioned in divers Acts of Parliament by the name of "The Manchester and Bolton Railway;" and amongst other works so authorised was constructed a station at the commencement of that railway near the river Irwell, in the township of Salford, near Manchester, and also certain warehouses, buildings, and conveniences connected therewith at Salford. Afterwards, on the 14th November, 1843, the following memorandum of agreement was made between J. Barnes on behalf of the Company of proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and signed by him on behalf of that Company; and J. Grundy on behalf of certain persons then intending to form a Company proposed to be called "The Bury and Rossendale Railway Company," but who were afterwards incorporated by the name of "The Manchester, Bury, and Rossendale Railway Company," and subsequently by the

name of "The East Lancashire Railway Company," and which memorandum or agreement was duly signed by him on their behalf.

"Memorandum of Agreement.—It is hereby mutually agreed between the parties undersigned, for themselves, and on behalf of the Company of proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and the Bury and Rossendale Railway Company:

"First, that they will mutually concur, co-operate, and aid, at the expense of the Bury and Rossendale Company, in obtaining an Act of Parliament in the ensuing session for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall.

"Secondly, that the Bury and Rossendale Railway Company shall have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it shall be referred in the usual way, shall determine.

"Thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal (that is, traffic using both lines or any portions thereof), between Salford and Rawtenstall, or any points intermediate to these, shall be carried on, as it respects engine power and carriages, clerks, porters, and all other expenses (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who shall pay to the Manchester and Bolton Railway Company for the use of their railway, and in respect to the traffic herein specified, a pro ratâ proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic, with no other deduction from the same than that hereinafter

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mentioned; and with this proviso, that nothing herein contained nor elsewhere provided shall authorise the Manchester and Bolton Railway Company to receive for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway in Salford; nevertheless, the Manchester and Bolton Railway Company shall be entitled to charge for the use of such portion of their railway for a length of two miles, at the least.

"Fourthly, that, previous to such apportionment of the gross rates, tolls, and proceeds referred to in clause 3, the Bury and Rossendale Railway Company shall be entitled to deduct so much of the passenger duty as shall be paid by them; and afterwards further to deduct from the proceeds of all such of the said traffic as shall have been conveyed in their carriages, wagons, and trucks, and by power provided at their expense, the further sum of 12½ per cent., and no more, from the proceeds arising from passenger traffic, including gentlemen's carriages, horses, and parcels, and 30 per cent., and no more, from the proceeds arising from merchandise or coal traffic, including stone.

"Fifthly, that the Manchester and Bolton Railway Company will, if required, subscribe 75,000*l.*, by taking shares to this amount, towards the expense of constructing the Bury and Rossendale Railway.

"Sixthly, that the Manchester and Bolton Railway Company shall be represented in the Bury and Rossendale Railway Company, as to the number of directors and votes at meetings of proprietors, in pro ratâ proportion with the amount of their subscription to the capital of the Company."

It was then found by the special verdict, that the parties making the agreement had power from their respective Companies to do so on their behalf; and that the

agreement was afterwards ratified by a certain deed or agreement bearing date the 22nd of January, 1844, and sealed with the common seal of the Company of proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and signed and sealed by J. Grundy on behalf of the directors of the Manchester, Bury, and Rossendale Railway Company afterwards incorporated as aforesaid.

By the said Act of the 7 & 8 Vict. c. lx., the Manchester, Bury, and Rossendale Company were authorised to make a railway, commencing by a junction with the Manchester and Bolton Railway in the township of Clifton, in the parish of Eccles, and passing through Clifton, Rossendale, and other places therein mentioned, all in the county palatine of Lancaster, and terminating in the township of Lower Booths, in the parish of Whalley, in the said county; and as soon as the junction between the railway thereby authorised to be made and the Manchester and Bolton Railway at Clifton should be effected, and the railway opened to passenger traffic to Bury, the Company should at all times be entitled to use so much of the Manchester and Bolton Railway as lies between the point of junction and the present terminus of the same railway in Salford, with their own engines, coaches, wagons, and other carriages, for the conveyance by them of all such passengers, cattle, goods, wares, merchandise, articles, matters, and things of every description, and of such only as should have first bonâ fide passed the railway thereby authorised to be made from, or should afterwards bonâ fide pass along the last-mentioned railway to, any of the usual and accustomed stations or stopping-places therein; subject only to the payment by way of toll to the said Company of proprietors of such charges, &c., as might have been or hereafter might be determined by mutual agreement between the two Companies; and also, for the purposes of such traffic only, to use the station at Salford and the conveniences connected therewith, but not so as to impede the

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traffic of the said Company of proprietors; and all the powers and remedies for the recovery of tolls, rates, and duties under the existing Acts of the said Company of proprietors, should be applicable to the recovery from the Company thereby incorporated of payments due in respect of the above traffic.

Other parts of the statute were then set out; and it was found as a fact that the length of the Manchester and Bolton Railway, from the commencement thereof from the river Irwell near Manchester, that is, at the station at Salford, to the point where the said junction is made therewith by the Manchester, Bury, and Rossendale Railway at Clifton, is four miles and no more; and that the entire length of that which was the Manchester, Bury, and Rossendale Railway is fourteen miles and no more; and that the length of so much thereof as extends from the junction at Clifton to Bury is six miles and no more.

By the 8 & 9 Vict. c. xxxv., certain persons were incorporated by the name of "The Blackburn, Burnley, Accrington, and Colne Extension Railway Company;" and were thereby authorised to make and construct a railway and works connected therewith, commencing by a junction with the Manchester, Bury, and Rossendale Railway, in the township of Tottington Higher End, in the parish of Bury, and passing through divers places therein mentioned to Accrington in the said county, and thence by means of two diverging lines of railway, the one passing through divers places therein mentioned and terminating at or near Blackburn, either by a distinct terminus or by a junction with the then intended Blackburn and Preston Railway, and the other of such diverging lines passing through Burnley and other places therein named, and terminating at or near Colne in the said county; and the last-mentioned Company were empowered to demise or lease the railway and works thereby authorised to the Manchester, Bury, and Rossendale Railway Company, for any term which might be mutu-

ally agreed upon; and the Manchester, Bury, and Rossendale Railway Company were also empowered, if they should think fit, to purchase the undertaking thereby authorised; and the Company thereby incorporated were authorised to sell the undertaking, either before or after completion, upon such terms as should be mutually agreed upon, and to convey the same to the Manchester, Bury, and Rossendale Railway Company; and that upon such conveyance being made, the undertaking should become and form part of the undertaking of the Manchester, Bury, and Rossendale Railway; and the said undertakings, when so united, should be called "The East Lancashire Railway;" and all the rights, privileges, and authorities of the Company incorporated thereby should thereupon vest in the Manchester, Bury, and Rossendale Railway Company. The Manchester, Bury, and Rossendale Railway Company having become, and being now called, the East Lancashire Railway Company by virtue of the 8 & 9 Vict. c. ci., by indenture of the 4th of August, 1845, between the Blackburn, Burnley, Accrington, and Colne Extension Railway Company, and the East Lancashire Railway Company, and sealed with their common seals, the undertaking and works of the Blackburn, Burnley, Accrington, and Colne Extension Railway Company, were duly conveyed to and became vested in the East Lancashire Railway Company, according to the provisions of the statute.

By agreement under seal of the 19th of March, 1846, between the Manchester, Bolton, and Bury Canal Navigation and Railway Company of the first part, the Manchester and Leeds Railway Company of the second part, and the East Lancashire Railway Company of the third part, it was provided (inter alia) that the agreement of the 22nd of January, 1844, and the provisions of the statute affecting the Bolton Company, should be confirmed by an Amalgamation Act of Parliament to be obtained if possible; subject to this alteration, that the East Lancashire Company,

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in respect of their traffic passing from the Manchester and Bolton line to the Victoria station or elsewhere, should be liable to pay to the Bolton or amalgamated Company, for the use of the Manchester and Bolton line between Clifton and Salford, the same sums only by way of toll as were set forth in the agreement of the 22nd of January, 1844. The Victoria station here mentioned is a station partly belonging to the Manchester and Leeds Railway Company, now called the Lancashire and Yorkshire Railway Company, and partly to the London and North Western Railway Company, and is connected with the station of the Manchester and Bolton Railway at Salford by a short Railway Branch, of the length of 1290 yards, being part of one of the lines of railway of the London and North Western Railway Company; by means of which passengers and goods passing on the Manchester and Bolton Railway may be forwarded to the Victoria station, and from thence by other lines of railway belonging to the Manchester and Leeds Railway Company; and passengers and goods coming from such other lines of railway may be forwarded to and along the Manchester and Bolton Railway, which became vested in the Manchester and Leeds Railway Company.

By the 9 & 10 Vict. c. ccclxxviii., the Manchester, Bolton, and Bury Canal Navigation and Railway, and all its real and personal estate and effects, rights, privileges, powers, and authorities, were vested in the Manchester and Leeds Railway, now called "The Lancashire and Yorkshire Railway Company;" and it was thereby enacted, that the Manchester and Leeds Railway Company might receive the rates, tolls, and charges therein mentioned, for and in respect of the passing of passengers and goods and carriages over the Manchester and Bolton Railway, with a proviso, that with respect to such passing over that railway for a less distance than six miles, the Manchester and Leeds Railway Company might demand tolls as for six miles. That

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statute likewise confirmed the agreements of the 22nd of January, 1844, and the 19th of March, 1846, unless where inconsistent with its provisions; and enacted that all the powers, authorities, rights, privileges, provisions, directions, matters, and things applicable to the Manchester, Bolton, and Bury Canal Navigation and Railway, and contained in any Acts relating to the East Lancashire Railway Company, save only as altered by itself, should be exercised by and be applicable to the Manchester and Leeds Railway Company; provided that nothing contained in that Act should prejudice, &c., any of the rights, &c., vested in the East Lancashire Railway Company by virtue of the last-named Acts of Parliament, relating to the use of the Manchester, Bolton, and Bury Railway, and the stations, warehouses, buildings and conveniences connected therewith.

By the 7 & 8 Vict. c. xxxiv., certain persons were incorporated by the name of "The Blackburn and Preston Railway Company," for the purpose of making a railway from Blackburn, in Lancashire, and terminating by a junction with the North Union Railways; and by the 8 & 9 Vict. c. ciii., certain alterations were allowed to be made in that line; and by the 9 & 10 Vict. c. cclxvi., the Company were empowered to make certain branch railways. By the 9 & 10 Vict. cccii., the Blackburn and Preston Railway Company was consolidated with the East Lancashire Railway Company; with the proviso that the tolls, rates, and charges to be taken by the Company in respect of the passage and conveyance respectively of all goods, articles, matters, and things upon the said railway and the Manchester and Bolton Railway, between its point of junction at Clifton and its then present terminus at Salford, should be computed at such rates as if the railways thereby amalgamated and the Manchester and Bolton Railway formed one line of railway. By "The Liverpool, Ormskirk, and Preston Railway Act, 1846," (9 & 10 Vict. c. ccclxi.), cer-

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tain persons were incorporated by the name of "The Liverpool, Ormskirk, and Preston Railway Company;" and were authorised to construct certain railways therein mentioned, and particularly a certain railway from a place near Liverpool to a place near Preston, and to connect the same with the Blackburn and Preston Railway, and were authorised to demise or lease their undertaking to the East Lancashire Company, or to sell and convey it to them; and it was accordingly so conveyed by indenture of the 5th of October, 1846. By the 10 & 11 Vict. c. oclxxxix., the East Lancashire Railway Company were empowered to extend their railway into Preston.

By the 9 & 10 Vict. c. cccxc., certain persons were incorporated by the name of "The West Riding Union Railways Company," and authorised to make certain railways communicating with the Manchester and Leeds Railway, and to receive for the use thereof certain rates, tolls, and charges for the passage of passengers and goods over and upon the said railways, with a proviso, that, with respect to the passing of the same over the said railways for a less distance than six miles, the Company might demand tolls for six miles; and that, from and after the undertaking thereby authorised should have been united to and amalgamated with the Manchester and Leeds Railway Company, the maximum rates of charge for the conveyance of passengers, &c., including the tolls for the use of the said railways, the locomotive power, and every other expense incidental to such conveyance, except Government duty, should be applicable to the Manchester and Leeds Railway, and to all other railways which then were or might thereafter, by virtue of any Act or Acts of Parliament to be passed in that session, be or become united to or amalgamated with the Manchester and Leeds Railway Company; with a proviso that nothing in that Act contained should authorise the Manchester and Leeds Railway Company to charge any higher rate upon any railway then

amalgamated with or united to, or which might, by virtue of any Act or Acts passed during the then present session of Parliament, be amalgamated with or united to, the Manchester and Leeds Railway, than the maximum rate allowed by the respective Acts severally applicable to such railway previous to such amalgamation; and by the last-mentioned Act, the West Riding Union Railways Company, thereby incorporated, was thereby united to and incorporated with the Manchester and Leeds Railway Company, afterwards and now called "The Lancashire and Yorkshire Railway Company," in pursuance of the 10 & 11 Vict. c. clxiii.

It was then found, by the special verdict, that the Manchester, Bury, and Rossendale Railway Company, until its change of name, and subsequently as the East Lancashire Company, used so much of the railway, formerly the Manchester and Bolton Railway, as lies between the point of junction and the terminus of that railway in Salford; that between Clifton and Salford there are two other stations, the Pendleton and Windsor Bridge; and that the length of the railway of the defendants, from the commencement at the junction at Clifton to New Hall Hey Bridge, is fourteen miles; and that the entire length of the defendants' railway is seventy-two miles; and that between the 29th April and the 1st June, 1849, divers steam-engines, trucks, carriages, and wagons of the defendants, with passengers, goods, chattels, and merchandise, did pass over that part of the railway of the plaintiffs, formerly called the Manchester and Bolton Railway, which lies between Salford and the junction at Clifton, to and from the usual and accustomed stations or stopping-places on the said railway of the defendants; and that some of such steam-engines, &c., came from, and other part thereof passed on to, stations and places on that part of the railway of the defendants which lies beyond the line of that portion of the defendants' railway which was formerly called the Manchester, Bury, and Rossendale Railway; that such passing as afore-

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said was by the sufferance and permission of the plaintiffs; and that payment of the tolls and duties claimed by the plaintiffs in this action was duly claimed on their behalf.

Tomlinson argued for the plaintiffs. [The argument is omitted as it is sufficiently stated in the judgment of the Court.]

Hugh Hill for the defendants.

Tomlinson replied.

Cur. adv. vult.

ALDERSON, B., now delivered the judgment of the Court. —The questions raised upon the argument of the special verdict in this case were two: first, as to the construction of a certain agreement of the 14th November, 1843, made between "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway," and "The Bury and Rossendale Railway Company;" and secondly, whether this agreement extends beyond the traffic along the Bury and Rossendale Railway alone, to the traffic along the whole railway of the present defendants. The agreement was as follows:—[His Lordship read it.]

At the time of this agreement, the contracting parties were, as is mentioned therein, "The Manchester, Bolton, and Bury Canal Navigation and Railway Company," and "The Bury and Rossendale Railway Company." The former of these Companies was afterwards, by 9 & 10 Vict. c. ccclxxviii. incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company," the present plaintiffs. The latter Company became "The Manchester, Bury, and Rossendale Company," and was extended to Blackburn, Burnley, Accrington, and Colne, and then became "The East Lancashire Railway Company;" and by divers subsequent Acts of Parliament certain other railways were incorporated with it; viz. the Blackburn and Preston

Railway, and the Liverpool, Ormskirk, and Preston Railway, so as to form an extensive line of railways altogether.

The question raised by the special verdict is, first, what is the proper rate of charge for carriages and passengers traversing the whole or any part of the space between the point of junction and the Salford station, which is found by special verdict to be of the length of four miles, and no more? As to the rate of charge for passing along these four miles between Clifton and Salford, Mr. *Tomlinson*, for the plaintiffs, contended, that they were entitled to charge that proportion of the whole amount received as tolls which the whole distance, viz. two miles, to be charged for on this part, bears to the whole distance travelled on the defendants' line alone. Thus, on a journey from Bury to Salford, ten miles altogether, composed of six miles from Bury to the junction and four from the junction to Salford, of which only two would be charged for, they would be entitled to that proportion of tenpence, the toll for the whole journey, which two bears to eight miles, the aggregate of six miles on the defendants' and two on the plaintiffs' railway, or one-fourth, viz. 2½*d.*

Mr. *Hill*, on the other hand, argued, that in that case it was to be in the same proportion which two bears to ten; the proportion of two miles to the whole distance travelled, or 2*d.*: and this latter we hold to be the true construction.

The defendants are to pay the plaintiffs a pro ratâ proportion according to the distance travelled over each railway; but the plaintiffs are not to receive for the use of their railway for a greater distance than half the length between the point of junction and the terminus, nor for a less distance than two miles. Now, as it turns out that the whole distance is four miles, the limits as to the maximum and minimum charge coincide; the rate per mile therefore for the charge is first to be settled by the relative distances actually travelled on each; and when so settled a distance of two miles is to be paid for at that

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rate. This is the plain and literal construction of the agreement, and we think the true one.

Then we arrive at the second question, to what railway does the agreement extend? It appears quite clear, that, at the time when the agreement was made, the question admitted of no reasonable doubt. The traffic of the Manchester, Bury, and Rossendale line could alone have been then contemplated, for there was no other; and the nature of the agreement itself strongly tends to shew that it must have been so limited, for it was an agreement to give accommodation at the Salford station to the traffic of the projected railway. Now that accommodation is of necessity limited by the station itself. It is one thing to accommodate traffic arising on a railway of fourteen miles, and quite another thing to do the same for a more extended, and indeed, as here contended for, an indefinitely extended, railway. Unless, therefore, we find an express extension of this agreement to the traffic of the present railways, we ought not to hold is as so extended. It is clear to us, that the accommodation given must have been limited, and unless we stop at the railway existing we can find no limit whatever.

Now, looking to the different Acts of Parliament whereby the original Manchester, Bury, and Rossendale Railway has been extended and incorporated with others, till at length it has become the aggregate now called "The East Lancashire Railway," we do not find provisions extending and at the same time limiting this accommodation. We think that these provisions amount to no more than this, that the agreement has been made applicable to those other railways, although they were not the parties who made the original contract, but that, in its terms, it remains as limited as before. They are entitled to all its provisions and benefits, quite as much as if they had been the original contracting parties to it. But the contract itself remains as before. If they wish the traffic beginning on these lines,

and passing over the original Manchester, Bury, and Rossendale Railway, and from it over the railway extending from the point of junction to the Salford station, or over any part thereof, to pass at the rates provided for by this agreement, they cannot do so without a fresh and additional agreement to that effect. It is a very different thing to say, that any traffic coming by coach or wagon or on foot to the original railway was contemplated, for that of necessity has the limit arising out of the very nature of such a mode of access; but the extension of the railway itself would, we think, clearly not be within the original agreement, for such additional traffic is really quite unlimited in its nature and extent, and it is clear that the agreement was for a limited accommodation only.

The second question will therefore be decided against the defendants; and the result will be a verdict for the plaintiffs, inasmuch as the money paid into Court will not be sufficient, unless both questions are determined in favour of the defendants. The amount we must leave the parties themselves to arrange.

Judgment for the plaintiffs.

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Dec. 3rd.

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By a railway mortgage debenture the defendants assigned to the plaintiffs "the said undertaking, and all the estate, right, title, and interest of the Company in the same, to hold until the sum of 1000*l.*, together with interest for the same at the rate of 5*l.* for every 100*l.* by the year, be satisfied; the principal sum to be paid on the 1st of January, 1851:"—*Held*, irrespective of any legislative enactment, that the first part of the debenture operated simply as a transfer of the subject matter till the sum was satisfied, i. e. the tolls—the unpaid calls—and all that belonged to the Company as the proprietors of the railway, but not the stock or property belonging to the Company as common carriers, nor the soil; that the latter part of the debenture imported a covenant by the Company, that the 1000*l.* should be paid on the day named; for the breach of which an action would lie against the Company, the judgment in which would be satisfied out of the general property of the Company.

DEBT.—The declaration stated, that, after the passing of the Eastern Union Railway Act, 1844, the Eastern Union Railway Amendment Act, 1845, the Eastern Union Hadleigh and Colchester Railway Act, 1846, and an Act 10 & 11 Vict. "To amalgamate the Eastern Union, and Ipswich and Bury St. Edmund's Railway Companies;" and after the making of the deed of mortgage hereinafter mentioned,—it was proved to the satisfaction of the Commissioners of Railways, and certified by them, that one-half of the whole amount of capital, exclusive of loans, by the several Acts of Parliament relating to the Company mentioned and referred to in the first-mentioned Act, authorised to be raised, and also half of the capital authorised to be raised by the Acts of Parliament relating to the Ipswich and Bury St. Edmund's Railway Company, mentioned and referred to in the Act fourthly above mentioned, had been actually paid up and expended for the purposes authorised by the several Acts of Parliament relating to the said two last-mentioned

The 7 & 8 Vict. c. lxxxv. s. 51, provides a remedy for the interest on a railway debenture, if in arrear for thirty days after demand in writing, by allowing the mortgagee to sue for the interest by an action of debt, or by requiring the appointment of a receiver. Sect. 52 provides a similar alternative remedy for the principal if it be not paid in six months after due, and after demand in writing. This Act was repealed by 10 & 11 Vict. c. clxxiv., which, by sect. 43, speaks of providing for the recovery of the arrears of interest and costs, or of the principal and interest and costs, and provides a right of action for the interest, or the appointment of a receiver, to recover its payment:—*Held*, that the 51st and 52nd sections of 7 & 8 Vict. c. lxxxv. might be construed, not as giving a right of action, but as recognising it as already existing, and giving the right of having a receiver instead; that the repeal of sect. 52 would not take away the right of action as it existed independently of that clause; and that the 53rd section of the Companies Clauses Consolidation Act provides a remedy by action to the party interested, if the money secured by the mortgage is not duly paid.

Companies respectively; and that thereupon, and by virtue of the Act of Parliament fourthly above mentioned, the defendants became incorporated by the said name of the Eastern Union Railway Company. That, after the passing of the said Acts of Parliament, and of the Eastern Union and Harwich Railway and Pier Act, 1847, and before the granting of the certificate, the Eastern Union Railway Company, in pursuance of the provisions of the said last-mentioned Act, and also of an order of a general meeting of the last-mentioned Company them empowering, by a certain deed of mortgage, in consideration of 1000*l.* by the said Company then borrowed at interest of the plaintiffs, the Company did assign to the plaintiffs the undertaking in the said last-mentioned Act mentioned, and all tolls and sums of money arising by virtue of that Act, and all the estate, right, title, &c. of the Company in the same: To hold unto the plaintiffs, until the sum of 1000*l.*, with interest at 5*l.* per cent., should be satisfied; and by the said deed it was stipulated, that the principal sum of 1000*l.* should be repaid on the 1st of January, 1851, being the period fixed by the Company for the payment thereof, which period elapsed after the certificate before the demand hereinafter mentioned, and before the commencement of this suit. That before the making of the said order of the said general meeting, and the borrowing of the money, all the money by the Acts first, secondly, and thirdly above mentioned authorised to be raised by shares, had been subscribed for, and that half thereof had been paid up; that the sum so borrowed of the plaintiffs did not, at the time of the borrowing, and at the date of the mortgage, together with other sums then borrowed under the authority of the said Acts, exceed the sum of 66,666*l.* in addition to the sum which, by the said three last-mentioned Acts, the Eastern Union Railway Company was empowered to borrow; and that, from the making of the said deed, the plaintiffs had been and still are the holders of and entitled to the said deed of mortgage; and that the

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said principal sum of 1000*l.* was not paid to the plaintiffs on the 1st of January, 1851; but that the said principal sum is still due.

The plea craved oyer of the mortgage-deed, which was as follows:—"Eastern Union Railway Company. Debenture-bond 1000*l.*, Mortgage, No. 112. By virtue of an Act passed on the 22nd day of July, 1847, intituled "The Eastern Union and Harwich Railway and Pier Act," we, The Eastern Union Railway Company, in consideration of the sum of 1000*l.* paid to us by J. G. Hart, of &c., and C. R. B., do assign unto the said J. G. Hart and C. R. B., their executors, administrators, and assigns, the said undertaking, and all the estate, right, title, and interest of the Company in the same: To hold unto the said J. G. Hart and C. R. B., their executors, administrators, and assigns, until the said sum of 1000*l.*, together with interest for the same, at the rate of 5*l.* for every 100*l.* by the year, be satisfied, the principal sum to be paid on the 1st day of January, 1851. Given under our common seal," &c.

They then pleaded a plea to which there was a demurrer, and which was admitted to be bad; upon this no question arose.

Mellish (with whom was *O'Malley*) for the plaintiff.—The plea is admitted to be bad, and the only question is, whether the declaration is good. It is submitted, that it is. The 50th section of the Companies Clauses Consolidation Act (*a*) empowers these Companies to fix a time for pay-

(*a*) The following sections of the different statutes were relied upon during the argument:

7 & 8 Vict. c. lxxxv. "An Act for making a Railway from Colchester to Ipswich" (July, 1844).

Sect. 51. "And in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and costs of any such mortgage or bond at the respective times at which such interest, or such principal and interest and costs, become due: Be it enacted, That if such interest or any part thereof shall, for thirty days after the same shall have become due, and demand thereof shall have been

ment, at which time the principal and interest are to be repaid on demand; and the 53rd authorises the appoint-

made in writing, remain unpaid, the mortgagee or bond creditor may either sue for the interest so in arrear by action of debt in any of the superior Courts, or he may require the appointment of a receiver, by an application to be made as hereinafter provided."

Sect. 52. "And with respect to such principal money, interest, and costs: Be it enacted, That if such principal money and interest be not paid within six months after the same has become payable, and after demand thereof in writing, the mortgagee or bond creditor may sue for the same in any of the superior Courts of law or equity; or, if his debt amount to 5000*l.*, he may alone, or if his debt does not amount to 5000*l.*, he may, in conjunction with other mortgagees or bond creditors whose debts, being so in arrear after demand as aforesaid, shall together with his amount to the sum of 10,000*l.*, require the appointment of a receiver by an application to be made as hereinafter provided."

8 & 9 Vict. c. 16: "The Companies Clauses Consolidation Act" (1845):

Sect. 42 enacts, "That the respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders if comprised therein, according to the respective sums in such mortgages mentioned, to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorised."

Sect. 50. "The Company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the Company shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period, the principal sum, together with the arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond; and if no other place of payment be inserted in such mortgage deed or bond, such principal and interest shall be payable at the principal office or place of business of the Company."

Sect. 53. "Where by the special Act the mortgagees of the Company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest due on such mortgages, by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage has become payable, and, after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the Superior Courts of law or equity, require the ap-

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ment of a receiver. The 42nd and 43rd sections do not give the mortgagees specific liens upon the goods and chattels of the Company: *Russell* v. *East Anglian Railway Company* (*a*); and upon a mortgage of the tolls, no part of the rents or personal estate of the Company passes: *Pontet* v. *Basingstoke Canal Company* (*b*), *Doe* d. *Myatt* v. *St. Helen's* (*c*); and unless a lender of money to such a Company has a remedy by action, he has no remedy. By the 50th section, the Companies are, at the expiration of the time fixed, to pay on demand; then a duty arises to pay, and on non-payment a cause of action.

Bramwell (with whom was *Cayley*) for the defendants.—

pointment of a receiver, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the Superior Courts of law or equity, may, if his debt amount to the prescribed sum, alone, or if his debt does not amount to the prescribed sum he may, in conjunction with other mortgagees whose debts, being so in arrear, after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver, by an application to be made as hereinafter provided."

10 & 11 Vict. c. clxxiv.: "An Act to amalgamate the Eastern Union and Ipswich and Bury St. Edmund's Railway Companies" (July, 1847).

Sect. 43. "And in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and costs of any such mortgage or bond as may have been or may be granted by either of the dissolved Companies, or by the new Company, at the respective times at which such interest or such principal and interest and costs become due; Be it enacted, that if such interest or any part thereof shall, for thirty days after the same shall have become due, and demand thereof shall have been made in writing, remain unpaid, the mortgagee or bond creditor may either sue for the interest so in arrear by action of debt in any of the Superior Courts, or he may require the appointment of a receiver, according to the provisions in that behalf contained in the said Companies Clauses Consolidation Act."

(*a*) Ante, p. 501; 20 L. J., Chanc., 257.

(*b*) 3 Bing. N. C. 433.

(*c*) Ante, Vol. 2, p. 756; *S. C.*, 2 Q. B. 364.

legislature that there should be any priority amongst debenture holders. The Companies Clauses Consolidation Act has given a form of security and provided certain remedies; and it is said, that, further, there is a remedy by action: if it was the intention of the legislature that such remedy should also have existed, it would have enacted so in express terms. The words of the instrument give no right of action. There are no words of covenant, and the plaintiff must pursue the remedy provided by the legislature: *Pontet* v. *The Basingstoke Canal Company.* It does not follow, that, in order that a creditor may be paid, he should have a right to sue. It is said, that the 53rd section recognises a remedy by action, because it uses the expression "without prejudice to" his right to sue for the interest; but that does not give the right to sue; some private Acts might give such right, and then this part of the clause would operate. [*Alderson*, B.—It is like "without prejudice to the rights of the Crown" inserted in Acts of Parliament, where the Crown has no rights.] Or the clause would apply where there is an express covenant in the mortgage bond; and so regarding the section, it would shew that no right of action was otherwise intended. Under the 42nd section, the respective *mortgagees* are entitled, one with another, to the respective tolls, without preference or priority; and under the 44th section, the *obligees* are entitled to be paid, so that the legislature has made the distinction: in the one case resort is to be had to the mortgaged property; in the other, the parties are to be paid. [*Martin*, B.—Surely it is for the creditors to set up that defence, not the debtors.] We are bound to make the payments in the course pointed out by the Act of Parliament, and cannot shew preference to either class of creditors; if we were, it would be a breach of trust. If the plaintiff has a right of action, there would be nothing to prevent his suing out an elegit on his judgment, and so getting a preference, which the Act says he is not to have. It will be prejudicial to all

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creditors, and there will be a race for the preference: *Price* v. *Great Western Railway Company* (*a*).

It was not the intention of the legislature that there should be a personal remedy. The 51st and 52nd sections of 7 & 8 Vict. c. lxxxv. give the right of suing for principal and interest. That Act was repealed by 10 & 11 Vict. c. clxxiv. s. 2; and the 53rd section of that Act gives a power of suing for interest only, but not for principal. The power, therefore, of suing for the principal was deliberately and intentionally, as it is submitted, taken away, and the remedy, of applying for a receiver, substituted. That is a legislative declaration, that there shall be no action for the principal.

The declaration is also bad, for not alleging that six months have elapsed (within the 52nd section of the original Act), and for not alleging a demand.

Mellish in reply.—As to the last objection, it does appear, on general demurrer, that six months have elapsed, and that there has been a demand in writing. The original Act clearly gave an action after six months; and the intention of the legislature was to take away the restriction of six months, and to give the action at once, as for any other debt, and that is done by the 50th section of the Companies Clauses Consolidation Act.

Cur. adv. vult.

PARKE, B., after stating the declaration and the deed poll, proceeded—The plea in this case is given up, and the question arises on the sufficiency of the declaration importing into it the form of the instrument; and the point to be decided is, whether an action will lie against the Eastern Union Railway Company. If we regard the form of the instrument only, without reference to the legislative provisions contained in the several local and personal Acts

(*a*) Ante, Vol. 4, p. 707; 16 M. & W. 244.

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relating to this Company, and those in the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), we think that an action is maintainable upon it. The first part merely assigns, in consideration of 1000*l.*, the undertaking and all the tolls and sums of money arising by virtue of the Act, to hold until the sum of 1000*l.*, with 5*l.* per cent. interest per annum, should be satisfied. If the instrument had stopped there, it would have operated simply as a transfer (commonly but improperly called a mortgage) of the subject-matter till the sum was satisfied thereout. The subject conveyed would be the tolls, certainly the unpaid calls, and all that belonged to the Company as the proprietors of the railway, which any one is at liberty to use on paying tolls, but not the stock or property belonging to the Company as common carriers of passengers or goods for hire, nor, according to the case of *Doe* d. *Myatt* v. *St. Helen's* (*a*), the soil of the railway itself. The Railway Acts have been prepared on the model of the Canal Acts, in which the principal object of the Company is the proprietorship of the canal, and the profit there arises from the use of it by the public in general; but, soon after the establishment of railways, it was found that the Companies alone could use them beneficially, by themselves monopolizing the conveyance upon them; so that the theory of these Acts and the practice under them are entirely at variance. So far the instrument we are considering would give no right of action to the plaintiffs, and would resemble *Pontet* v. *Basingstoke Canal Company;* but in the conclusion there is a stipulation that the principal is to be paid on the 1st of January, 1851; and this certainly imports a covenant by the Company that the same shall be repaid, unless there be something in the Acts to qualify or alter the meaning of that expression. The effect, then, of the instrument would be

(*a*) Ante, Vol. 2, p. 756; *S. C.*, 2 Q. B. 364.

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to pledge the tolls and property of the Company as proprietors, but not their stock or property as carriers; and to impose an obligation on them to repay the principal on a certain day, for the breach of which an action would lie against the Company, the judgment in which action would be satisfied out of their general property not comprised in the pledge belonging to them as carriers or otherwise.

It remains to be considered, what the effect of the statute is upon the construction of the instrument. The money appears by the statement in the declaration to have been borrowed under the powers of the 10 & 11 Vict. c. ccxxv. The statute contains no clauses as to the form or effect of the securities for the money borrowed under its provisions, but refers to certain prior Railway Acts, which are the 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xciv., 9 & 10 Vict. c. xcvii., and to the Lands and Railways Clauses Consolidation Acts (8 & 9 Vict. cc. 18, 20), enacting (sect. 1), that all the provisions contained in the recited Acts, so far as the same were then in force, and except such as were inconsistent with the provisions of the Lands and Railways Clauses Consolidation Acts, 1845, and except such as by that Act were altered or otherwise provided for, should extend to such Act and the purposes thereof, as fully and effectually as though such provisions were re-enacted in that Act. The next section extends all the provisions of the Lands and Railways Clauses Consolidation Acts to that Act, and also the 10 Vict. c. 27, save so far as they may be inconsistent with the provisions thereinbefore contained; and the said Acts and that Act are, for the objects and purposes thereof, to be read as one Act. There is no small difficulty in construing an Act made up from different parts of other Acts, partly repealed and partly not; but upon the best consideration we can give, the result is, that the Acts do not affect the right of action for the principal. The 7 & 8 Vict. c. lxxxv. s. 51, provides a remedy for the interest, if in arrear for thirty days after demand in

writing, by allowing the mortgagee to sue for the interest in an action of debt in any of the superior Courts, or by requiring the appointment of a receiver. Section 52 provides a similar alternative remedy for the principal, if it be not paid in six months after it is due, and after demand in writing; in which case the mortgagee may either sue in the superior Courts, or have a receiver. But this Act was repealed by 10 & 11 Vict. c. clxxiv. (local and personal), s. 2, and therefore was not in force at the time of the passing of the 10 & 11 Vict. c. ccxxv. (local and personal); and then the 10 & 11 Vict. c. clxxiv., which speaks of providing for the recovery of the arrears of interest and costs, or of the principal and interest and costs, gives a right of action for the interest, or the appointment of a receiver to recover its payment; and this creates a doubt whether the legislature did not intend to take away the right of action for the principal altogether, leaving the mortgagee a right of action for the interest; and, if that was unpaid for thirty days, and a demand had been made in writing, a right to have a receiver, and by that means to recover both; but sections 51 and 52 of the repealed Act of the 7 & 8 Vict. c. lxxxv., are susceptible of a different construction, namely, that, in case the interest in the one case, or the principal in the other, might be in arrear for the time prescribed, and demand should be made in writing, the mortgagee might either use the right of action to recover it which he had already by law, or he might have a receiver appointed. The sections may be construed not to give a right of action, but to recognise it as already existing, and to give the right of having a receiver after thirty days' or six months' delay in the payment of interest or principal, as the case might be. The repeal, therefore, of the 52nd section would not take away the right of action, for it existed independently of that clause. The framers of the Act probably thought it unnecessary to re-enact the 52nd section, as its place would be supplied by the 53rd section

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of the Companies Clauses Consolidation Act, which provides for the application of the remedy of a receiver where the principal is in arrear for six months, and demand made in writing; and also enacts, that it shall be exercised without prejudice to the right to sue for the principal, which right it thereby recognises. To this it may be added, that the Companies Clauses Consolidation Act, by section 50, expressly provides, that, if a day is fixed for the payment of the money secured by the mortgage, the money must be paid on that day to the party interested; and the meaning must be, that, if then not paid, it must be enforced by action. We are therefore of opinion, that the right of suit, which the mortgagee had under such an instrument as that declared upon, is not taken away or affected either by the Companies Clauses Consolidation Act, or any of the special Acts referred to in the statute 10 & 11 Vict. c. ccxxv., under which the mortgage in question was given; and therefore the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

A WRIT of error having been brought on this judgment—

Bramwell and *Willes* appeared for the plaintiff in error

Mellish, for the defendants in error.

The argument and the cases cited were the same as in the Court below.

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COLERIDGE, J., delivered the judgment of the Court.—The question in this case is, in substance, whether, on the declaration with the instrument declared on imported into it on oyer, the action is maintainable against the Eastern Union Railway Company? We are of opinion in the affirmative; and, consequently, the judgment of the Court below must be affirmed. It was not denied by the counsel for

the plaintiff in error that the instrument itself, on its face, apart from all considerations of its validity, imported a covenant by the Company for repayment of the money advanced upon a day therein named. But it was contended, in the first place, that, unless enabled by specific statutory provisions, the Company could not bind themselves by any such covenant as this instrument imports, so as to give a right of action; and secondly, that not only were there no such enabling clauses in the statutes relied on by the plaintiffs, but that these statutes give other specific remedies for the recovery of the money advanced, which alone could be had recourse to; and, thirdly, it was contended, that even if an action could be maintained at all, it could only be after demand in writing, of which there was no sufficient allegation in the declaration. Now, we are clearly of opinion, that where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument, which, on its face, imports a covenant for repayment, if money be so borrowed and so secured, an action may be maintained against the corporation, on a breach of the covenant. This appears to us a necessary inference from the premises just stated; and as all these premises concur in the present case, without a more specific examination of the sections of the various statutes, this is enough to dispose of the first point made by the plaintiffs in error, a point undoubtedly not very earnestly insisted on by their counsel. The second point will require a more detailed examination of the several statutes referred to in the argument. By the mortgage it appears that the money in question was borrowed under the powers conferred by the 10 & 11 Vict. c. ccxxv. The money borrowed under that Act is by the 7th section borrowed under the same or the like provisions as are contained in the 8 & 9 Vict. c. xciv. This Act enables the Company there named to bor-

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row on mortgage or bond, and for securing the repayment of the mortgage money as authorised by 7 & 8 Vict. c. lxxxv. To this Act, therefore, we must look; and though, by the 10 & 11 Vict. c. clxxiv. it is for general purposes repealed, yet for the purposes of our present inquiry it is in full force. The 37th section of that Act gives power to borrow, and to secure repayment by mortgage of the railway and future calls; the 49th section enables the Company to fix the period for the repayment of the principal and interest; and in such case they are to cause a period to be inserted in the mortgage deed, as they have done here, on the expiration of which period it is enacted, that the principal and the arrears of interest shall be paid to the party entitled to the mortgages. It being indisputed that the money in question was borrowed, under such circumstances, in all respects, as satisfied the conditions imposed by the legislature, and that the instrument of security is in the form prescribed, it is clear, if the statute had stopped here, an action might have been maintainable; and this is very important in determining the construction of the sections to which we are now coming, and on which has arisen whatever difficulty has been felt by any member of this Court in the decision of this case. The plaintiffs in error contend that these, and these alone, give any right of action as upon a condition not complied with. The defendants in error maintain that they give no right of action, that they only recognise the pre-existing right, and add thereto another specific remedy at the option of the borrower. These sections, 51 and 52, which may be read as one, commence with this preamble,—"And in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest, and costs, of any such mortgage or bond, at the respective times at which such principal, interest, and costs become due." And then the 52nd section, as to principal and interest, and costs, enacts, "that if the same be not paid within six months after the

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same has become payable, and after demand thereof in writing, the mortgagee or bond-creditor may sue for the same in any of the superior Courts of law or equity; or, if his debt amount to 5000*l.*, and, if not, in conjunction with other creditors to the amount of 10,000*l.*, may require the appointment of a receiver. The 51st section had previously provided, that, if the interest should remain unpaid for thirty days after it should have become due, and demand thereof should have been made in writing, the mortgagee or bond-creditor might either sue in an action of debt, or might require the appointment of a receiver. Now, as to both principal and interest, the 49th section, as we have just seen, provided that it should be paid at the expiration of the period, on a day named in the instrument of security. If, therefore, we hold that the expiration of six months in one case, and thirty days in the other, after such period, are conditions precedent to any right to recover by action, either we make the sections inconsistent, or we must suppose a mere right has been declared by the former section, that is, a right to repayment on a day named for the purpose by the debtor, but no remedy to enforce it given until the thirty days, or six months later, with a superadded condition of a demand in writing. This in itself would be unreasonable, and the more so because these terms certainly do not apply to the Company, which is left at liberty to pay at a day named at all events, a liberty which, considering how often such loans are made by way of investment, and how the value of money fluctuates in short periods of time, will, in many supposable cases, operate very inconveniently to the lender. Moreover, if we give this construction to the 49th section, we must do the same to the 50th, which provides for cases where no time has been fixed in the mortgage-deed or bond for the repay-
of the money, and enacts that the lender may, at
xpiration, or at any time after the expiration, of
months from the date of such mortgage, demand

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payment of the principal, with all arrears of interest, on giving six months previous notice. It would be strange to hold, that, where by six months notice, at the end of twelve months, the money under this section had become payable, still that no action could be maintained till after six months further default and demand in writing. Yet this must be the consequence, if we hold the right of action is given by the 51st and 52nd sections only. But this construction, which involves such difficulty, is not a necessary one; all the enacting words of both would receive a full and satisfactory meaning, if we suppose them to provide only specifically for the case of default for thirty days or six months respectively after demand made in writing, and in either of these specified cases, to enact that the Company would be subject not only to an action, but, at the option of the lender, to have a receiver put upon them, an arrangement which, whether advantageous or not to the lender, could not but be highly inconvenient to them. We agree with the Court below in thinking that this is the true construction of these sections, and it has the advantage of making them agree with the corresponding sections of the Companies Clauses Consolidation Act the 8 & 9 Vict. c. 16, sections 50, 51, 52, and 53, of which provide for the repayment of the money borrowed at interest where a time has been fixed, and where no time has been fixed in the instrument; and the last of which expressly gives a right to require the appointment of a receiver after thirty days or six months default, as the case may be, and after demand in writing, without prejudice to the right to sue. The conclusion to which we have been thus brought on this point makes it unnecessary to consider whether the demand in writing is sufficiently alleged; and we are therefore of opinion that the decision of the Court of Exchequer ought to be affirmed.

Judgment affirmed.

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TO THE

PRINCIPAL MATTERS.

* *The Cases in Chancery are distinguished by the letters* Ch.

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CONSTRUCTION OF ACT OF PARLIAMENT.
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Although a Court of equity has jurisdiction, in a proper case, to prevent an application to Parliament for a private Act, or an Act respecting property, it will not interfere on the ground that such an application, if successful, would affect pre-existing rights, whether such rights exist by tenure of property or by virtue of contract.

A Railway Company applied to Parliament for an Act to form their line, and their application was opposed by a landowner through whose land the line would pass. He afterwards withdrew his opposition on the faith of an agreement which provided for the formation of a branch line to his iron-works. The Company obtained an Act for this purpose, but afterwards determined to abandon their intention of making the branch railway, and were about to apply to Parliament for an Act to enable them to do so, when the plaintiff filed his bill for an injunction. The Vice-Chancellor of England granted the injunction; but the Lord Chancellor, on appeal, reversed his decision, and dissolved the injunction.

Held, that a contract to make a railway is not one of which a Court of equity will compel the specific performance, but will leave the parties to their legal remedies. *Heathcote* v. *The North Staffordshire Railway Company*—Ch. 358

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See EVIDENCE, 2.

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LANDS CLAUSES CONSOLIDATION ACT, 1.

1. A Railway Company, requiring the property of landowners, gave notice to them, under the Lands Clauses Consolidation Act, to treat for it. The landowners thereupon gave notice to the Company that they were owners and lessees of the land, and that their interest therein was parti-

cularly described in a schedule served therewith; that they claimed, as compensation for the purchase-money, and for damage that might be sustained by the execution of the works, 2280*l.* 8*s.*; and that, if that sum was not paid, they desired to have the amount settled by arbitration, they thereby appointing their arbitrator, and requiring the Company to appoint an arbitrator on their behalf. In the schedule annexed were included certain pieces of land severed by the railway, and respectively of less than half an acre, which the landowners, under the 93rd section, required the Company to purchase. The Company thereupon served the landowners with a notice appointing an arbitrator, to whom was to be referred the amount of compensation to be paid by the Company for the purchase of the said lands. At the reference, the landowners gave evidence of the value of the small pieces of land mentioned in the schedule, being respectively less than half an acre. The umpire awarded one entire sum for the purchase of the fee simple which the Company required, and for the small pieces mentioned in the schedule:—*Held*, that, as nothing had been submitted but the value of the land which the Company desired to purchase, and as one entire sum was awarded for that and the small pieces of land which the landowners required the Company to take, the award was bad; but the Court refused to set it aside.

Whether the award could be supported by reference to the conduct of the parties—*Quære.* *In the Matter of an Arbitration between the North Staffordshire Railway Company and Wood*, 25

2. On a reference to arbitration under the Lands Clauses Consolidation Act, 8 Vict. c. 18, the arbitrators or umpire have no power, in the first instance, to determine anything but the amount of compensation payable by the promoters; but, as soon as that is determined under sect. 34, the costs may be subsequently taxed and settled by a separate instrument, and they need not be incorporated in the award. The settlement of the costs need not be within three months after the time of the reference. The 34th section directs the arbitrators, not the umpire, to settle the costs:—*Held*, that the term "the arbitrators" means the persons who make the award, either as arbitrators or umpires.

In debt on the award for the recovery of the compensation awarded and costs, the declaration alleged that the umpire "was required by the plaintiff to settle and determine the costs to be paid to the plaintiff:"—*Held*, on special demurrer, a sufficient averment that the umpire was required to adjudicate upon the costs, and that it was sufficient. *Gould* v. *The Staffordshire Potteries Waterworks Company*, 568

ARREST.

1. The plaintiff became a passenger by the defendants' railway, and took his ticket from Monk's Ferry to Bangor and back. The defendants' line extends from Monk's Ferry to Chester, and the Chester and Holyhead Railway continues the line to Bangor. On the plaintiff's return at Chester, the ticket collector demanded 2*s.* 6*d.* extra, which the plaintiff refused to pay; he was thereupon taken into custody by a railway servant, under the direction of a superintendent, to the police station, where he paid the money under protest, and was released. The Chester station is occupied by the defendants and by other Railway Companies; one of the witnesses stated, that he believed the

person who took the plaintiff into custody was a servant of the defendants. The plaintiff's attorney having written to the secretary of the defendants for compensation, received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. He afterwards stated, that it was an awkward business, and that the blame would fall upon the station-clerk; he also offered to repay to the plaintiff's attorney the sum of 2*s.* 6*d.*, which had been over-paid. This was refused, and he thereupon saw the plaintiff on the subject:—*Held*, in an action against the defendants for the arrest, that there was no evidence of authority for the arrest or of subsequent ratification by them, and that they were not liable in the action.

Whether the letter of the secretary was admissible in evidence against the defendants—*Quære.* *Roe* v. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 795

2. The plaintiff, a passenger by railway, on the arrival of the train at the terminus, was taken into custody by the Company's servant, and detained at the station upon a charge made by the servant of refusing to give up his ticket or pay his fare, and also of assaulting the servant in the execution of his duty; subsequently, upon the hearing of the charge before the magistrate, the attorney of the Company appeared in support of it:—*Held*, that though the assault and false imprisonment was capable of being ratified by the Company without an instrument under seal, if committed on their behalf and for their benefit, the facts afforded no evidence of ratification. *The Eastern Counties Railway Company and Richardson* v. *Broom*, 743

ASSESSMENT.

See LANDS CLAUSES CONSOLIDATION ACT.

In the city of London, in lieu of tithes, the incumbents of several parishes were, by virtue of a decree made under the authority of an Act of Parliament, entitled to a money payment after the rate of 2*s.* 9*d.* in the pound upon the houses and buildings in their respective parishes.

In August, 1839, a Railway Company obtained an Act of Parliament, and took thirty-three of the houses in the parish of St. Olave; and, by the 33rd section of one of their Acts, the Company were bound, for the purpose of indemnifying the rector, to pay such yearly sums in respect of such houses, "according to the last assessments thereof, to the 25th of March last," as would be equal to the loss in tithes which the rector might sustain for want of occupiers by reason of such taking. No assessment had been made at the date mentioned in the Act, but the rector had received, in some cases, 2*s.* in the pound upon an agreed sum (being less than the actual rental) from all inhabitants except public Companies, from whom he received 2*s.* 9*d.* upon the full annual value.

The rector now claimed 2*s.* 9*d.* in the pound upon the full annual value of the houses taken by the Company during the period the ground remained unoccupied:—*Held*, by the House of Lords, reversing the decision of Vice-Chancellor *Wigram*—

That the measure of indemnity to which the rector was entitled, was the rate and computation which had been adopted by him and the tithe payer previously to the establishment of the Company.

That no actual assessment having been made, the amount claimed by the rector, and paid by the occupiers

to the 25th March, 1839, constituted the "assessment" referred to in the Act.

That, in computing the amount of compensation to be paid by the Company to the rector, the Company should be allowed credit not only for such tithe-rent as should have been received, but also for such tithe-rent as should have become payable in respect of new buildings erected on the site of these houses taken by the Company. *Letts* v. *The London and Blackwall Railway Company*—Ch. 687

BANKRUPTCY.

See SHARES, 4.

BOND.

See COMPANIES CLAUSES CONSOLIDATION ACT.
PLEADING.

A Railway Company, requiring a certain piece of land held by plaintiff for a term of thirteen years unexpired, gave him the usual notice to treat; and ineffectual attempts were made to settle the price by agreement. Nothing further was done until two years after, when the Company gave a bond and deposited the estimated value, and entered into possession. These proceedings were clearly informal; and the Company afterwards deposited the sum claimed by the plaintiff, and delivered a bond for that amount, which recited the quantity of land required, and was conditioned for the payment to him, his executors, administrators, or assigns, or into the Bank for his or their benefit, of such purchase-money or compensation as might be determined to be payable. The plaintiff filed his bill for an injunction:—*Held*, that the summary powers given by the 85th section of the Lands Clauses Consolidation Act are not confined to cases of pressure, and are not affected by the fact that sufficient time has been allowed to elapse for the Company to have ascertained the price by award or verdict. That, where the party dealing with the Company represents the entirety of a certain interest, it is sufficient that the condition of the bond be for payment to him, his executors, administrators, and assigns; and it is not necessary that the bond should contain the alternative, "for the parties interested in such lands." That a recital in the bond, of the quantity of land required out of a certain larger piece, is sufficient description to satisfy the terms of the 85th section. That an entry into the possession of land begun wrongfully does not preclude a Company continuing in possession when they have done all that was originally required to render their entry rightful.

From what date, whether from the date of the trespass or from the date of the rightful possession, interest on the purchase-money would be payable by the Company—*Quære*. *Willey* v. *The South Eastern Railway Company*—Ch. 100

CALLS.

See CAPITAL OF COMPANY, 1.
EVIDENCE, 4.
INFANT.
PLEADING, 1, 3, 4.
SHARES, 2, 4.

1. The capital of a Company was divided into three classes of shares, viz. 31*l*., 27*l*. 10*s*., and 22*l*. each. A call of 10*s*. per share was made on the holders of the 31*l*. shares alone; whereupon the plaintiff filed his bill on behalf of himself and all other holders of 31*l*. shares, except such defendants as were holders of such shares, against the Company and the directors, alleging undue partiality to the holders of other shares; that the call was not required for the purposes of the Act;

and that the real motive of the call was to compel the 31*l.* shareholders to enter into an agreement injurious to their rights. The bill prayed an inquiry whether any and what part of the call was necessary, and an injunction. The defendants demurred for want of equity and parties.

Demurrer allowed, on the ground that the bill contemplated a continuance of the Company; and that the Court could not entertain jurisdiction without assuming authority to interfere with the internal management of continuing partnerships and companies:—*Held*, that plaintiff could not sue on behalf of the shareholders who had paid, and those who had not paid the calls; and that the bill was defective in not alleging that the holders of the other shares were duly and fully represented by the defendants.

Leave to amend bill refused.

In an argument on demurrer, sections of Railway Acts, though declared to be public Acts, cannot be referred to unless they are stated in the bill. *Bailey* v. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company*—Ch. 256

2. The resolution of the Board of Directors of a Railway Company, that a call be made, is the call within the 8 Vict. c. 16, s. 16. *Ex parte Tooke, In re The Londonderry and Coleraine Railway Company*, 1

3. Where it was enacted, that, "so soon as the sum of 1,500,000*l.* shall have been subscribed &c., it shall be lawful for the Company to put in force all the powers of the said Act authorising the construction of the said Railway, and of the Acts therein recited," viz. the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act, as regards a portion of the Railway:—*Held*, that the raising of the capital was not a condition precedent to the power of the Company to make calls, but only to their right of exercising the compulsory powers for taking land. *The Waterford, Wexford, Wicklow, and Dublin Railway Company* v. *Dalbiac*, 753

4. The transferree of shares, who neglects to procure the deed of transfer to be registered, is not liable, in an action *for money paid*, for the amount of calls made subsequently to the transfer, and which the plaintiff, the transferror, being the registered owner, has been compelled to pay. *Sayles* v. *Blane*, 79

5. An action of debt will not lie for a call payable by instalments, until all of the instalments are due. *Semble*, that a call payable by instalments is bad. *Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company* v. *Coulthard*, 218

6. There is no legal objection to a call being made payable by instalments. *London and North Western Railway Company* v. *M'Michael*, 495

Birkenhead, Lancashire, and Cheshire Junction Railway Company v. *Webster*, 498

Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company v. *Norcliffe*, 500

7. Debt for calls.—The declaration stated, that the defendant, at the time of the making of the calls, *was and still is* the holder of thirty-nine shares, &c., and *was and still is* indebted to the Company &c.:—*Held* good on special demurrer, though not conformable with 8 Vict. c. 16, s. 26. *East Lancashire Railway Company* v. *Croxton*, 214

8. The executors of a shareholder are not liable in an action for calls in the statutory form under the Companies Clauses Consolidation Act, when the call is made in the lifetime of the testator. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company* v. *Cotesworth*, 211

to the 25th March, 1839, constituted the "assessment" referred to in the Act.

That, in computing the amount of compensation to be paid by the Company to the rector, the Company should be allowed credit not only for such tithe-rent as should have been received, but also for such tithe-rent as should have become payable in respect of new buildings erected on the site of these houses taken by the Company. *Letts* v. *The London and Blackwall Railway Company*—Ch. 687

BANKRUPTCY.

See SHARES, 4.

BOND.

See COMPANIES CLAUSES CONSOLIDATION ACT.
PLEADING.

A Railway Company, requiring a certain piece of land held by plaintiff for a term of thirteen years unexpired, gave him the usual notice to treat; and ineffectual attempts were made to settle the price by agreement. Nothing further was done until two years after, when the Company gave a bond and deposited the estimated value, and entered into possession. These proceedings were clearly informal; and the Company afterwards deposited the sum claimed by the plaintiff, and delivered a bond for that amount, which recited the quantity of land required, and was conditioned for the payment to him, his executors, administrators, or assigns, or into the Bank for his or their benefit, of such purchase-money or compensation as might be determined to be payable. The plaintiff filed his bill for an injunction:—*Held*, that the summary powers given by the 85th section of the Lands Clauses Consolidation Act are not confined to cases of pressure, and are not affected by the fact that sufficient time has been allowed to elapse for the Company to have ascertained the price by award or verdict. That, where the party dealing with the Company represents the entirety of a certain interest, it is sufficient that the condition of the bond be for payment to him, his executors, administrators, and assigns; and it is not necessary that the bond should contain the alternative, "for the parties interested in such lands." That a recital in the bond, of the quantity of land required out of a certain larger piece, is sufficient description to satisfy the terms of the 85th section. That an entry into the possession of land begun wrongfully does not preclude a Company continuing in possession when they have done all that was originally required to render their entry rightful.

From what date, whether from the date of the trespass or from the date of the rightful possession, interest on the purchase-money would be payable by the Company—*Quære*. *Willey* v. *The South Eastern Railway Company*—Ch. 100

CALLS.

See CAPITAL OF COMPANY, 1.
EVIDENCE, 4.
INFANT.
PLEADING, 1, 3, 4.
SHARES, 2, 4.

1. The capital of a Company was divided into three classes of shares, viz. 31*l.*, 27*l.* 10*s.*, and 22*l.* each. A call of 10*s.* per share was made on the holders of the 31*l.* shares alone; whereupon the plaintiff filed his bill on behalf of himself and all other holders of 31*l.* shares, except such defendants as were holders of such shares, against the Company and the directors, alleging undue partiality to the holders of other shares; that the call was not required for the purposes of the Act;

and that the real motive of the call was to compel the 31*l.* shareholders to enter into an agreement injurious to their rights. The bill prayed an inquiry whether any and what part of the call was necessary, and an injunction. The defendants demurred for want of equity and parties.

Demurrer allowed, on the ground that the bill contemplated a continuance of the Company; and that the Court could not entertain jurisdiction without assuming authority to interfere with the internal management of continuing partnerships and companies:—*Held*, that plaintiff could not sue on behalf of the shareholders who had paid, and those who had not paid the calls; and that the bill was defective in not alleging that the holders of the other shares were duly and fully represented by the defendants.

Leave to amend bill refused.

In an argument on demurrer, sections of Railway Acts, though declared to be public Acts, cannot be referred to unless they are stated in the bill. *Bailey* v. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company*—Ch. 256

2. The resolution of the Board of Directors of a Railway Company, that a call be made, is the call within the 8 Vict. c. 16, s. 16. *Ex parte Tooke, In re The Londonderry and Coleraine Railway Company*, 1

3. Where it was enacted, that, "so soon as the sum of 1,500,000*l.* shall have been subscribed &c., it shall be lawful for the Company to put in force all the powers of the said Act authorising the construction of the said Railway, and of the Acts therein recited," viz. the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act, as regards a portion of the Railway:—*Held*, that the raising of the capital was not a condition precedent to the power of the Company to make calls, but only to their right of exercising the compulsory powers for taking land. *The Waterford, Wexford, Wicklow, and Dublin Railway Company* v. *Dalbiac*, 753

4. The transferree of shares, who neglects to procure the deed of transfer to be registered, is not liable, in an action *for money paid*, for the amount of calls made subsequently to the transfer, and which the plaintiff, the transferror, being the registered owner, has been compelled to pay. *Sayles* v. *Blane*, 79

5. An action of debt will not lie for a call payable by instalments, until all of the instalments are due. *Semble*, that a call payable by instalments is bad. *Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company* v. *Coulthard*, 218

6. There is no legal objection to a call being made payable by instalments. *London and North Western Railway Company* v. *M'Michael*, 495

Birkenhead, Lancashire, and Cheshire Junction Railway Company v. *Webster*, 498

Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company v. *Nordcliffe*, 500

7. Debt for calls.—The declaration stated, that the defendant, at the time of the making of the calls, *was and still is* the holder of thirty-nine shares, &c., and *was and still is* indebted to the Company &c.:—*Held* good on special demurrer, though not conformable with 8 Vict. c. 16, s. 26. *East Lancashire Railway Company* v. *Croxton*, 214

8. The executors of a shareholder are not liable in an action for calls in the statutory form under the Companies Clauses Consolidation Act, when the call is made in the lifetime of the testator. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company* v. *Cotesworth*, 211

formed part of the contract for the conveyance of the horses, and that the allegation of the defendants' having received the horses "to be safely and securely carried," was not supported by the evidence.

Semble, that, notwithstanding the terms of the contract, the plaintiff might have alleged a breach of duty in the defendants' not providing a sufficient carriage. *Shaw* v. *The York and North Midland Railway Company*, 87

CERTIORARI.

See LANDS CLAUSES CONSOLIDATION ACT.

COMPANIES CLAUSES CONSOLIDATION ACT.

See CALLS, 5, 7, 8.
CONTRACT, 2.
EVIDENCE, 1.
FORFEITURE.
INFANT.
RECEIVER.
STATUTES.

On an assignment of a railway bond, under the 46th section of the Companies Clauses Consolidation Act, the proper party to sue is the assignee. *Vertue* v. *The East Anglian Railway Company*, 252

COMPENSATION.

See ARBITRATION, 2.
ASSESSMENT.
LANDS CLAUSES CONSOLIDATION ACT, 3, 6.
MANDAMUS.

1. A Company, incorporated by Act of Parliament, advertised for tenders for the formation of their line of railway. The plaintiff sent in a tender for a portion of the work, which was accepted by the engineer of the Company, authorised to act on their behalf, and such consent was recognised by the directors at a board meeting. Nothing further was done, and no specific contract, in a legal form, was reduced into writing to which the seal of the Company had been affixed. The plaintiff, in consequence, as he alleged, of the acceptance of his tender, went to a great outlay, in order to be prepared for proceeding with the works; but the whole scheme being afterwards abandoned, the directors refused to allow him compensation for the expenses incurred. The plaintiff filed his bill for relief, whereupon the Company demurred generally for want of equity. The Lord Chancellor allowed the demurrer, and *held*, that where, by legal enactment, certain formalities are required to render contracts legally binding on the parties, the want of such formalities will not be a ground for giving jurisdiction in equity in matters to which such jurisdiction would not otherwise be extended. That, on argument of demurrer, the mere allegation of trusteeship, which is a conclusion of law, is not of itself sufficient, but the case made must support the allegation. *Jackson* v. *The North Wales Railway Company*—Ch. 112

2. Although the property of a landowner may not be taken or directly interfered with by a Railway Company in the formation of their line, yet, if it be injuriously affected or consequential damage ensue to it by the execution of the works, a Court of equity will not interfere at the suit of the Company to restrain him from pursuing such remedies for obtaining compensation as are given by the 68th section of the Lands Clauses Consolidation Act.

The judgment of the late Lord Chancellor *Cottenham* in *The London and North Western Railway Company* v. *Smith* (Ante, Vol. 5, p. 716) reviewed. *The East and West India Docks and Birmingham Junction Railway Company* v. *Gattke*—Ch. 371

The South Staffordshire Railway Company v. *Hall*—Ch. 389

3. The lessee of an inn and premises, situate near the tunnel of a railway, was prevented, by the vibration caused by the passing of the trains, from keeping his beer in his cellars in a fit state for consumption, and the value of the house was alleged to be materially lessened by the consequent loss of custom, and the impossibility of using it as a public house. He thereupon gave notice to the Company of his claim for compensation under the 68th section of the Lands Clauses Consolidation Act, and was prosecuting the remedy given by that section, when the Company filed a bill, and obtained an injunction to restrain him from proceeding further under it. The Lord Chancellor, on appeal, however, dissolved the injunction.

Semble, that the sheriff and the jury are authorised to decide, not only the amount of compensation, but the right to it. *The London and North Western Railway Company* v. *Bradley*—Ch. 551

4. A Railway Company being about to construct their line through the land of C., it was agreed that it should be referred to an arbitrator to fix the amount of the purchase-money, and the compensation to be paid for the injury and damage to the remaining estate by severance and otherwise. The arbitrator awarded that 7990*l.* be paid for the purchase of the land, to include all injury and damage to the estate of the said C., by severance or otherwise:—*Held*, that the compensation awarded related only to all damage known or contingent, by reason of the construction of the Railway on the lands purchased of C., and to other damage arising from the construction of the Railway at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and did not embrace also all contingent and possible damage which might arise afterwards by the works of the Company at other places, and which could not have been foreseen by the arbitrator. The defendants' Railway passed across low lands adjoining a river, over which the flood waters used to spread themselves. Those low lands were separated from the plaintiff's land by a bank, constructed under certain drainage Acts, and which protected the plaintiff's land from the floods. By the construction of the defendants' Railway without sufficient openings, the floods could not spread themselves as formerly, and were penned up and flowed over the bank on the plaintiff's land:—*Held*, that, though the defendants had constructed their line according to the provisions of their Act, they were liable for an unforeseen injury to the plaintiff, arising from the mode in which the Railway was constructed. *Lawrence* v. *The Great Northern Railway Company*, 656

COMPULSORY POWERS OF COMPANY.

See LANDOWNER.
MANDAMUS.

By an Act of Parliament, with which the Lands Clauses Consolidation Act was incorporated, it was enacted, that the powers of taking land compulsorily for the purpose of making a certain Railway, should not be exercised after the expiration of three years from the period of the passing of the Act. The Company gave notice to a landowner of their intention to take a part of his land, but took no other step until three days before the expiration of their compulsory powers, when they delivered a bond, and proceeded to take possession under the 85th section of the Lands Clauses Consolidation Act.

The landowner thereupon filed his bill, praying an injunction to restrain the Company from proceeding further with the purchase, on the ground that their compulsory powers had ceased.

The Vice-Chancellor granted the interim injunction, but directed a case for the opinion of the Court of Exchequer. *Kinnersley* v. *The North Staffordshire Railway Company*—Ch. 662

CONSTRUCTION OF ACT OF PARLIAMENT.

The 42nd section of the 8 & 9 Vict. c. cc., provides, "that if so much of the Railway by this Act authorised to be made as may be transferred to the South Eastern Railway Company, shall not be completed within three years from the completion of such transfer, it shall not be lawful, after the expiration of the said period, for the South Eastern Railway Company, unless authorised by Parliament so to do, to pay any dividend until the whole of the said Railway shall be opened to the public for traffic."

The transfer was completed; and although more than three years had expired since such completion, the Railway was not opened for traffic. The South Eastern Company nevertheless, at three intervals of half a year each, declared three dividends, two of which were duly paid. A holder of a particular class of shares, who had received interest thereon, filed his bill on the same day on which the third dividend was declared, on behalf of himself and all other the shareholders of the Company except the directors, praying an injunction to restrain the Company from paying any dividend, whether declared or thereafter to be declared, until the Railway in question had been opened to the public for traffic. *The Master of the Rolls* granted an injunction as to future dividends; but *held* that the Court might exercise its discretion as to the dividend then declared, and gave liberty to the defendants to make out a case by affidavit to induce the Court not to interfere.

The defendants having failed to satisfy the Court, the Master of the Rolls granted the injunction as to the dividend then declared, but not yet paid.

The Lord Chancellor, on appeal, discharged so much of the order of the Court below as restrained the payment of the dividend declared before the injunction issued, and affirmed the rest of the order.

Held, that the right of each shareholder to a declared dividend is a separate interest, and cannot be represented by a plaintiff suing on behalf of himself and all other shareholders. *Carlisle* v. *The South Eastern Railway Company*—Ch. 670

CONTRACT.

See ACT OF PARLIAMENT.

1. By an agreement under seal between the plaintiff and the defendants, promoters of a bill in Parliament for making a Railway, after reciting that the line of Railway was proposed to be carried close to the plaintiff's park, and through some of his land, which bill he had opposed, he, in consideration of the covenants therein contained, acceded thereto: It was witnessed, that, in consideration of the covenants on the defendants' part, the plaintiff did covenant that he would accede to the bill, provided it passed in the present or ensuing session of Parliament; and, in consideration of the assent given to the bill by the plaintiff, the defendants covenanted, that, in the event of the bill passing, the Company should pay him for so much land intersected by the line as might be required, at the rate of 120*l.* per acre; and that

they should pay him 3000*l.* in full compensation for the general damage which the line should or might do to the mansion, park, and estate, including therein the crossing of the road near the entrance of the park, the obstruction of views, &c., the expense of temporary residence during the progress of the works, the depreciation in value as a residence, the additional expense in the cultivation of the farms by the alteration of the road, and all other damage to be done to the mansion and park. And the plaintiff agreed, on tender of 120*l.* per acre, and 3000*l.*, that he would convey:—*Held*, per *Parke*, B., and *Platt*, B., that the defendants had thereby bound themselves that the Company should pay the 3000*l.* on the passing of the Act, although the Railway should not be constructed, or any actual damage be done to the plaintiff; but, per *Pollock*, C. B., that the taking of the land and damage done were conditions precedent to the payment of the 3000*l.* *Bland* v. *Crowley*, ... 756

2. A public Company, incorporated by Act of Parliament, entered into a contract under seal with the plaintiff, for the execution of certain works according to the terms of a specification, which also contained provisions for extra work. He entered upon the work under the superintendence of the Company's engineer, and with his approbation executed certain extra works not coming within the provisions of the contract under seal. The work being finished the plaintiff made a claim upon the Company to a large amount, and the directors paid him a sum on account. By sect. 97 of the Companies Clauses Consolidation Act, the directors are empowered to make parol contracts, without the same being reduced into writing, where such contracts would, if entered into between private persons, be valid; and, by the 98th section, the directors are bound to enter minutes of such contracts in a book, and, by one of the clauses of the special Act of the Company, three directors constitute a quorum:—*Held*, in an action for the extra work, that the mere fact of the work being done was not sufficient, in the absence of any order of directors, or anything from which a parol contract could be inferred, such as would bind the Company; and that there was no evidence for the jury of liability on the part of the defendants. *Homersham* v. *The Wolverhampton Waterworks Company*, 790

3. In an action by an allottee of shares in a projected Railway Company, which had been abandoned, the plaintiff gave secondary evidence of the letter of allotment, but gave no evidence of any letter of application for shares, nor did it appear that there had been any, though it was proved what was the usual form of such letters. The letter of allotment was headed "Not transferable." He then produced the banker's receipt, with a 20*s.* stamp on it; and then gave in evidence a letter from him to the defendant, stating that he had not received his shares, and requesting a return of his deposit, and an answer, "that every effort was being made to go to Parliament this Session." Nothing more took place:—*Held*, on a bill of exceptions, that it was not necessary that the plaintiff should have proved a letter of application; for, if no letter of application was sent, there was no written contract, because the letter of allotment would be the first writing, and that was only an assent to an offer by parol; that, if a letter of application was sent, there was a variance between the two documents, the words "not transferable" in the letter of allotment imposing a new term. *Secondly*,

that the stamp was sufficient, within the 10th section of 55 Geo. 3, c. 184. *Thirdly*, that there was sufficient evidence of an abandonment of the scheme. *Chaplin* v. *Clarke*, 193

CONTRACT UNDER SEAL.

1. The directors of a Railway Company, incorporated by Act of Parliament, were empowered thereby to use the common seal on behalf of the Company; and it was enacted (sect. 119), that all contracts relating to the affairs of the Company, which should be signed by any three of the directors, in pursuance of a resolution of a court of directors, should be binding on the Company. The 120th section empowered the directors to employ workmen and to regulate the traffic on the line, and the rates and tolls, and appoint and displace the bankers and solicitors of the Company, and all such managers, officers, agents, clerks, workmen, and servants, as they should think proper. By a resolution of the court of directors, signed by the chairman, the plaintiff was employed as agent of the Company, to negotiate with another Company for the lease of the line:—*Held, first*, that the plaintiff was not an agent within the 120th section; and, *secondly*, that as the resolution was not under the corporate seal, or signed by three of the directors, the Company were not liable for services rendered under that resolution. *Cope* v. *The Thames Haven Dock and Railway Company*, 83

2. By an Act of Parliament incorporating a Railway Company, the directors were authorised to use the common seal, and all contracts in writing relating to the affairs of the Company, which should be signed by any three of the directors, were to be binding on the Company. The Company, after having been established for some time, resolved to change the system of locomotion, and, by their secretary, entered into an agreement, *not under seal*, with a contractor that he should execute the works. He accordingly commenced the works, but before they were completed he was dismissed by the Company:—*Held*, that he could not recover the value of the work done.—*Diggle* v. *The London and Blackwall Railway Company*, 590

CONTRIBUTORY.

1. E. O., on her second marriage, assigned certain shares to B., a trustee, for her separate use. B. made a verbal communication to the clerk of the Company, of the execution of the settlement, but no transfer or registration of the shares into B.'s name was made, and they continued in the name of the original holder. B. received the dividends, but there was nothing to shew that he received them in the character of assignee of the shares. The Master had placed B.'s name on the list of contributories, and the Vice-Chancellor *Knight Bruce* refused to strike it out:—The Lord Chancellor, dissenting from the decision of the Court below, held that B. was rightly placed on the list of contributories, and gave leave to the respondent to try the question of B.'s liability by an action at law. The Court of Chancery will not direct an issue when the question of right can be tried by action. *Ex parte Hall*—Ch. 145

2. A. consented by letter to have his name placed on the list of the provisional committee, subject to his approval of the line, and "so that he should be held free from all liabilities;" he attended two meetings; but took no part in the proceedings, and left before any resolution was formally passed or recorded. A few days af-

terwards, he desired that his name might be struck out of the provisional committee; and that was accordingly done. A. afterwards paid 65*l.* under protest towards the expenses of the concern:—*Held*, that A. was not a contributory within the meaning of the Act.

Held, also, that payment of a sum of money *causâ pacis* and under protest, does not create a liability which would not otherwise exist. *Ex parte Roberts, Re The Direct Exeter, Plymouth, and Devonport Railway Company*—Ch. 310

3. A person allowing his name to be placed on the list of the provisional committee of a Railway Company in the course of being formed, without more, does not thereby authorise his companions or their officers to pledge his credit with strangers, and he is not a contributory within the meaning of the Acts.

The mere fact of payment of a sum of money by a provisional committeeman, to avoid trouble and contention, is not sufficient of itself to raise either a legal or equitable liability. *Norris* v. *Cottle*—Ch. 317

4. A. accepted shares in the character of a member of the provisional committee of a projected Company, but did not pay the deposit thereon. He did not attend any meetings, or in any manner intermeddle with the affairs of the Company:—*Held*, that the fact of being by his own choice a provisional committee-man, concurring with the fact of his acceptance of shares, made him a contributory within the meaning of the Acts. *Hutton* v. *Upfill, Re The Direct Birmingham, Oxford, Reading, and Brighton Railway Company*—Ch. 338

5. Where the number of subscribers to a scheme for forming a Company proves insufficient to raise the necessary capital, and the project turns out to be impracticable:—*Held*, that an allottee of shares is not a contributory within the Acts. *Ex parte Maudslay*, 350

6. A. applied by letter for shares in a provisionally registered Railway Company, and received a letter of allotment of certain shares, on which he was required to pay the deposit; and the letter, with the banking receipt appended thereto, was to be exchanged for scrip upon A.'s executing the Parliamentary contract and subscribers' agreement. A. paid the deposit, but did not execute any deed. The scheme having been abandoned, and an order made for winding-up the Company, the Master, in settling the list of contributories, placed A.'s name upon the list, but the Vice-Chancellor on appeal ordered it to be removed.

Held, by the House of Lords, affirming the decision of the Vice-Chancellor, that A.'s name had been properly removed from the list of contributories. That A. had not subjected himself to any other obligation or responsibility than to take certain shares in the proposed Company in the event of its being in fact established, which it never was. That the stat. 7 & 8 Vict. c. 110, did not alter the existing law, so as to render an allottee of shares liable beyond what his own contract had done. *Re The Direct Birmingham, Oxford, Reading, and Brighton Railway Company; Hutton* v. *Thompson:* and *Re The Wolverhampton, Chester, and Birkenhead Junction Railway Company; Norris* v. *Cooper*—Ch. 708

COPYHOLD.

See LANDS CLAUSES CONSOLIDATION ACT, 2.
PURCHASE-MONEY, 2.

COSTS.

See LUNATIC.

On petition for investment of purchase-money in Court under the 80th section of the Lands Clauses Consolidation Act, a Railway Company is

not bound to pay the costs of the appearance of persons holding mortgages on a life estate in the land purchased. *Ex parte Smith, Re The Lancashire and Yorkshire Railway Company*—Ch. 150

COSTS (SECURITY FOR).

An Irish Railway Company, carrying on business at Westminster, was compelled to give security for costs, though it had personal property in England, and most of its shareholders resided there. *The Kilkenny and Great Southern and Western Railway Company* v. *Fielden*, 785

DEBENTURE.

See MORTGAGE.

DEMURRER.

See CALLS, 1.
COMPENSATION, 1.
CAPITAL OF COMPANY.

DEPOSIT.

See SHARES.

DIRECTORS (POWER OF).

See PRACTICE, 1.

DIVIDEND.

See CONSTRUCTION OF ACT OF PARLIAMENT.

The right of each shareholder to a declared dividend is a separate interest, and cannot be represented by a plaintiff suing on behalf of himself and all other shareholders. *Carlisle* v. *The South Eastern Railway Company*, 670

ENTRY ON LANDS.

See BOND.

EVIDENCE.

See CARRIER.
PROVISIONAL COMMITTEE, 3.

1. The entry on the sealed register of the defendants, as R. "and others, trustees," is not a sufficient entry so as to be evidence of the defendants' being shareholders within the 8 Vict. c. 16, s. 18. *Birkenhead, Lancaster, and Cheshire Railway Company* v. *Brownrigg*, 47

2. The effect of an admission may be altered if the admission arise from a mistake in law. The general doctrine, that a party is at liberty to prove that an admission made by him was mistaken or untrue, and is not estopped by it, unless another person has been induced by it to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of fact. *Newton* v. *Liddiard*, 42

3. The returns of the names of shareholders of a Joint-stock Company under the 7 & 8 Vict. c. 110, are sufficient prima facie evidence of the fact of those persons being shareholders, in order to justify the Court in issuing execution against them under sect. 68 of that Act. The notice required by that section to be given to the shareholder need not be personally served on him. *Turner* v. *The Metropolitan Live Stock Company*, 45

4. In an action for calls, in order to shew notice thereof to the defendant, the plaintiff proved that it was the course of business for C., a deceased clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put them into a basket for another clerk to post, which he had done on the occasion of this call. A list of shareholders, containing the name of the defendant, was produced in C.'s handwriting, and indorsed by him "Letters sent out." C. had received instructions to make out such list, and had been seen filling up and directing the notices, with such a list before him:—*Held*, that such list so indorsed was admissible as evidence that

notice of the call had been sent to the defendants. *The Eastern Union Railway Company* v. *Symonds*, 578

EXECUTION.

See JOINT STOCK COMPANIES. RECEIVER.

EXECUTORS.

See CALLS, 8.

FORFEITURE.

The power given to Companies by the 29th section of the 8 Vict. c. 16, to declare shares forfeited on non-payment of calls, is a cumulative remedy with that of the right of action; and, therefore, it is no defence to an action by a Company for calls, that, since the commencement of the suit, the directors have declared the shares forfeited. *The Great Northern Railway Company* v. *Kennedy*, 5

INCUMBRANCERS (PRIORITY OF).

See RECEIVER.

A bond creditor of a railway Company filed a bill on behalf of himself and other bond creditors against the Company and the remaining bond creditors and mortgagees, some of whose debts had not then become due, praying an account of all monies raised by the Company upon bond or mortgage, and a declaration that the bond and mortgage creditors were entitled to be paid out of the estate and effects of the Company, and praying a receiver and manager.

An order having been made by consent for the appointment of a receiver, while he was in possession a simple contract creditor sued out execution, and levied upon the goods of the Company, and refused to withdraw after notice given of the appointment and possession of the receiver. Upon motion made before Vice-Chancellor *Knight Bruce*, to commit the sheriff and under-sheriff for contempt, the parties having declined to accede to a proposition by the Court to bring the amount of the levy into Court, the Vice-Chancellor refused to interfere.

The motion having been brought by appeal before the *Lord Chancellor*, he ordered the sheriff to withdraw from possession and pay the costs, without prejudice to any application by the execution creditor to be heard, *pro interesse suo* or otherwise. The Court at the same time by its order protected the sheriff from any proceedings by the judgment creditor, he having been served with notice and appearing on the motion.

Whilst the motion last referred to was in course of decision, another simple contract creditor sued out execution on his judgment on the 7th of November, and on the 9th of the same month the officer of the sheriff of Norfolk entered the Company's station at Lynn, and seized the engine and carriages just then on the point of starting.

The *Lord Chancellor* in the second case made a similar order, but refused protection to the sheriff, on the ground that the execution creditor, for whom the sheriff acted, was not before the Court.

In the discussion of this motion the Court refused to entertain the question of the propriety of the order appointing the receiver, it being an established rule that such a question can only be discussed on a motion to discharge that order. *Russell* v. *The East Anglian Railway Company*—Ch. 501

INFANT.

1. Under the Companies Clauses

Consolidation Act, an infant shareholder is not absolutely bound, but he is in the same situation as an infant acquiring real estate or any other permanent interest; he is not deprived of the right which the law gives every infant of waiving and disagreeing to a purchase which he has made; and, if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due.

Debt for calls.—Plea, that the Company, in pursuance of the defendant's application, granted the shares to him as the original holder thereof, and entered his name in the register as the proprietor, and so the defendant became the original holder of the shares by contract; that, when the shares were granted to him, and his name entered as aforesaid, and at the respective times of making the calls, the defendant was an infant; that he has never ratified or confirmed the said application, grant, entry, and proprietorship, but the same have remained wholly unratified and unconfirmed; that he has not at any time derived any profit, benefit, or advantage whatsoever from the shares or by reason of his being the proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant:—*Held*, on general demurrer, bad, for not averring that the defendant had attained his majority, disclaimed, and given back the shares, or that he had not attained his majority. *The London and North Western Railway Company* v. *M'Michael*, 618

2. Debt for calls.—Plea, that, at the time when the defendant first became the holder of the shares, and at the time of his making the contracts by virtue of which the debts, causes of action, and liabilities accrued to the plaintiffs and were incurred by the defendant, and at the time of his making and entering into the contracts, by virtue of which the plaintiffs claim to be entitled by law to make the call upon the defendant, he was an infant. Replication, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of full age.

It appeared that the defendant became the purchaser of the shares whilst he was an infant, but that the call was made after he attained his full age:—*Held*, that the term "contract," meant the contract by which the defendant became a shareholder, and that the plea was proved. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company* v. *Pilcher*, 564

(The plea has since been held to be bad in arrest of judgment, see ante, p. 622.)

3. Where there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, the plea is insufficient. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company* v. *Pilcher*, 622

INVESTMENT.

See COSTS.

JOINT STOCK COMPANIES.

See EVIDENCE, 3.

The 68th section of the 7 & 8 Vict. c. 110, does not apply to proceedings by shareholders merely, but to all cases where a creditor may sue a Company. The Court will not, however, give leave to issue execution under that section, unless the creditor has used due diligence to obtain satisfac-

tion out of the property and effects of the Company. Therefore, where the affairs of an insolvent Joint-stock Company, completely registered under the 7 & 8 Vict. c. 110, were directed to be wound up by the Court of Chancery under the 11 & 12 Vict. c. 45:—*Held*, that a judgment creditor was in the first instance bound to prove his debt before the Master under the 73rd section of that statute; but that, if that remedy proved abortive, this Court would, in the exercise of its discretion, permit the creditor to proceed directly against the persons liable to contribute under the 7 & 8 Vict. c. 110.

Semble, per *Platt*, B., that a proceeding under 7 & 8 Vict. c. 110, to obtain execution against a shareholder of a Company, is a proceeding in an action within the 73rd section of the 11 & 12 Vict. c. 45. *Thompson* v. *The Universal Salvage Company*, 10

LANDOWNER.

See COMPENSATION.
COMPULSORY POWERS.

A Railway Company, under the powers of their Act, purchased land of A. and also of B. The Company, after the period when their powers for taking land compulsorily had ceased, entered into possession, and commenced felling timber on a piece of land which they supposed they had purchased from B.; whereupon A. claimed to be tenant for life, and gave notice of such claim to the Company, who refused to entertain it. A. then filed his bill, praying an injunction to restrain the Company from continuing in possession or committing waste. The affidavits on both sides being inconclusive as to the title, the Court refused to interfere by injunction, but left the plaintiff to his remedy at law. *Webster* v. *The South Eastern Railway Company*—Ch. 698

LANDS CLAUSES CONSOLIDATION ACT.

See ARBITRATION.
BOND.
COMPENSATION, 2.
COMPULSORY POWERS.
COSTS.
LUNATIC.
MANDAMUS.
NOTICE TO TAKE LANDS.
PURCHASE-MONEY.
STATUTES.

1. A Railway Company requiring certain lands for their line, in pursuance of the 18th section of the Lands Clauses Consolidation Act, gave notice to L. & H., parties interested, to treat for their purchase. L. & H. thereupon served the Company with a notice, that, as trustees of F., they had *an estate and interest* in the lands, and claimed 3344*l.* for the same, and desired to have their compensation settled by arbitration; and they thereby appointed T. as their arbitrator. The Company nominated their arbitrator, and the arbitrators appointed an umpire, who proceeded with the reference. At the reference, one W. appeared, and claimed compensation, alleging that he had an agreement for the renewal of an unexpired lease in the premises. The umpire awarded 1861*l.* to be paid by the Company to L. & H. for the purchase "of the fee simple in possession, free from all incumbrances:"—*Held*, first, that the submission was not in compliance with the statute, the claimants not having therein stated the nature of their interest. Secondly, that the award was bad, the umpire not having found the nature and value of the interest of L. & H.; but the Court declined to interfere on motion.

Quære, whether the submission was binding on the parties by reason of their conduct. *In the Matter of an*

Arbitration between The North Staffordshire Railway Company, and Thomas Landor, Richard Hughes, and Robert Hughes, 17

2. Where the steward of a manor was by custom entitled to one fee upon the surrender, and another on the admittance to copyhold lands:—*Held*, that, under the 95th section of the Lands Clauses Consolidation Act, he was entitled to one fee only on a surrender. *Cooper* v. *The Norfolk Railway Company,* 94

3. A jury having been impannelled under the Lands Clauses Consolidation Act, 8 Vict. c. 18, to assess the amount of compensation to be paid to a landowner for land compulsorily taken, and other lands injuriously affected by severance, &c., the landowner claimed the expense of erecting a bridge to connect his premises with the highway, which was severed by the line. The jury found a gross sum for the purchase of the lands required by the Company, a sum for severance, and a sum "for severance owing to the crossing, and the expense incurred thereby." Evidence was given that this last sum would be the cost of the bridge:—*Held*, that the jury were not warranted in awarding the latter sum, inasmuch as that was a matter for the adjudication of justices under 8 Vict. c. 20, s. 69; and as this was an excess of jurisdiction, a certiorari would lie to remove the proceedings, notwithstanding sect. 145 of 8 Vict. c. 18, which takes away that writ. *In Re The South Wales Railway Company* v. *Richards,* 197

4. The limitation of 8 Vict. c. 18, s. 123, for the compulsory purchase of land, does not apply against a landowner, who, having within the prescribed period received a notice that his land was required by the promoters, and having within that period regularly served them with a notice that he required the amount of compensation to be determined by a jury, and, wishing to complete the sale of his land, applies for a mandamus to compel the Company to issue a warrant for summoning a jury; in such case, the powers that the landowner wished to be exercised were not "powers of the promoters of the undertaking for the compulsory purchase or taking of land" within the above section. *Reg.* v. *The Birmingham and Oxford Junction Railway Company,* 628

5. The words "lands which shall have been *taken* for or injuriously affected by the execution of the works," in the 68th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18), include such lands only as are actually taken or actually affected by the works.

The owner of houses, which were liable to be taken for making a Railway under an Act of Parliament, received notice under the 18th sect. of the 8 Vict. c. 18, from the promoters, that they would be required for the Railway, and the Company demanded the particulars of his interest therein, and stated their willingness to purchase. The particulars were furnished by the landowner, and 4500*l.* was claimed as compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the Company to summon a jury to assess the amount. The Company took no further step in the matter:—*Held*, that the landowner could not maintain an action to recover the 4500*l.* *Burkinshaw* v. *The Birmingham and Oxford Junction Railway Company,* 600

6. The owner of land in the city of L. claimed compensation, under the Lands Clauses Consolidation Act, for an injury done by a Railway Company to such lands in the construction of their works. The injury was occasioned by the works of the Company in the county of L., by cutting

off the communication on the county side with a ferry appurtenant to the claimant's land:—*Held, first*, that the jury of the city were competent to try the question of compensation; *secondly*, that the ferry, if attached to the claimant's land, was a private right in respect of which compensation might be assessed; *thirdly*, that the jury were warranted in finding, under the circumstances, that the ferry was vested in the claimant. *In re Cooling and The Great Northern Railway Company*, 246

LUNATIC.

Where the committees of a lunatic's estate, under the powers of the Lands Clauses Consolidation Act, contract with a Railway Company for the sale of a piece of his land, the sanction of the Lord Chancellor must be first obtained, and the costs of the application and of the consequent reference to the Master are costs within the 80th section of the same Act, and must be borne by the Company. *In re Taylor*,—Ch. 741

MAJORITY AND MINORITY.

See CAPITAL OF COMPANY, 2.

MANDAMUS.

1. On an application for a mandamus against a Railway Company, by a landowner, over whose land the line was authorised to be made, but to whom no notice had been given by the Company requiring his land, to complete the line and to purchase the necessary land for that purpose:—*Held*, that it was no answer to the rule, that the prescribed period for the compulsory purchase of the necessary land had nearly expired, if there was still a period during which the Company might take the requisite initiatory steps.

Semble, the obtaining a private Act of Parliament enabling parties to execute railway works, creates an obligation on the parties to complete them. *Reg.* v. *The York, Newcastle, and Berwick Railway Company*, 648

Reg. v. *The Lancashire and Yorkshire Railway Company*, 654

2. The writ of mandamus supposes the required act to be possible; and if it be shewn that the party have not the power to do the act commanded, the writ is bad:—*Held*, therefore, that a Railway Company could not be compelled by mandamus to purchase land to make a branch railway, where the compulsory powers of the Company to purchase the necessary land had expired before the writ issued, though the Company had, a month before the expiration of the powers, been required by the landowners so to do.

Whether the want of funds to complete the line would have been a good answer to the writ—*Quære*. *Reg.* v. *The London and North Western Railway Company*, 634

(See *Reg.* v. *Lancashire and Yorkshire Railway Company*, 20 L. J., Q. B., 507).

3. The South Wales Railway Company having power to cross the L. Railway, included in their deposited plans and book of reference certain lands on which the L. Railway was constructed, and gave notice to the L. Company that they required to purchase such lands for the purposes of their railway. The South Wales Railway Company had no power to purchase, nor had the L. Company to sell, any part of their actual line:—*Held*, that a mandamus could not be sustained requiring the South Wales Railway Company to issue their warrant to the sheriff to summon a jury to assess compensation for the purchase of the land on which the L. line was constructed. *Reg.* v. *The South Wales Railway Company*, 489

MASTER AND SERVANT.

See ARREST.
NEGLIGENCE, 2.

In trespass against a Railway Company for running over the plaintiff's sheep and killing them, it appeared that the sheep got on the line by reason of the defect in the Company's fences, and were run over by an engine of the Company, driven by their servant. The engine was going at the rate directed by the Company, and could not be stopped so as to avoid the accident:—*Held*, that the Company were not liable in trespass; that, if the sheep were wrong-doers, there was no misconduct for which the defendants were responsible; that, if the sheep had escaped through defect of the defendants' fences, the sheep were not wrong-doers, and the damage would be consequent on the defendants' wrong, and the Company would be liable in an action on the case.

In all cases where a master gives the direction and control over a carriage or animal to a rational agent, the master is only responsible in an action on the case for want of skill or care of the agent. *Sharrod* v. *The London and North Western Railway Company*, 239

MORTGAGE.

By a railway mortgage-debenture the defendants assigned to the plaintiffs "the said undertaking, and all the estate, right, title, and interest of the Company in the same, to hold until the sum of 1000*l.*, together with interest for the same at the rate of 5*l.* for every 100*l.* by the year, be satisfied; the principal sum to be paid on the 1st of January, 1851:"—*Held*, irrespective of any legislative enactment, that the first part of the debenture operated simply as a transfer of the subject matter till the sum was satisfied, i. e. the tolls—the unpaid calls—and all that belonged to the Company as the proprietors of the railway, but not the stock or property belonging to the Company as common carriers, nor the soil; that the latter part of the debenture imported a covenant by the Company, that the 1000*l.* should be paid on the day named; for the breach of which an action would lie against the Company, the judgment in which would be satisfied out of the general property of the Company.

The 7 & 8 Vict. c. lxxxv. s. 51, provides a remedy for the interest on a railway debenture, if in arrear for thirty days after demand in writing, by allowing the mortgagee to sue for the interest by an action of debt, or by requiring the appointment of a receiver. Sect. 52 provides a similar alternative remedy for the principal if it be not paid in six months after due, and after demand in writing. This Act was repealed by 10 & 11 Vict. c. clxxiv., which, by sect. 43, speaks of providing for the recovery of the arrears of interest and costs, or of the principal and interest and costs, and provides a right of action for the interest, or the appointment of a receiver, to recover its payment:—*Held*, that the 51st and 52nd sections of 7 & 8 Vict. c. lxxxv. might be construed, not as giving a right of action, but as recognising it as already existing, and giving the right of having a receiver instead; that the repeal of sect. 52 would not take away the right of action as it existed independently of that clause; and that the 53rd section of the Companies Clauses Consolidation Act provides a remedy by action to the party interested, if the money secured by the mortgage is not duly paid. *Hart* v. *Eastern Union Railway Company*, 818

Affirmed in error, 826

NEGLIGENCE.

1. In an action for negligence there is no distinction between injuries arising from the careless and unskilful management of an animal or other personal chattel, and an injury resulting from the negligent management of fixed real property, unless, perhaps, where the act complained of is such as to amount to a nuisance; therefore, where a Company empowered to make a railway contracted, under seal, with others to make and complete a portion of the line, and it was agreed that the works should be done by the contractors, and that the Company should have a general right of watching the progress, and, if the contractors employed incompetent workmen, of dismissing them, and during the progress of the works the workmen, through negligence, caused the death of a person passing along a public highway:—*Held*, that the Company were not liable in an action by the administratrix of the deceased, under 9 & 10 Vict. c. 93, (Lord Campbell's Act). *Reedie* v. *The London and North Western Railway Company*, 184

Hobbitt v. *The London and North Western Railway Company*, 188

2. A master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant while acting in one common service, provided the master shall have taken due care not to expose his servant to unreasonable risks. But, in such a case, the master is not exempt from responsibility where the servant injured was not at the time of the injury acting in the service of the master.

H., a servant of a Railway Company, in the discharge of his duty, was in a train under the guidance of others of their servants; and by the neglect of those servants, whilst they were engaged together in a common service, a collision took place, and H. was killed:—*Held*, that his administratrix could not maintain an action against the Company under the 9 & 10 Vict. c. 93.

A declaration under the 9 & 10 Vict. c. 93, stated that H. was in the service of the defendants, and that, in the discharge of his duty as such servant, he became a passenger in a carriage of the defendants, drawn by a steam engine under the guidance of the defendants; that the defendants were possessed of another steam-engine, which then was drawing other carriages, under the guidance of the defendants, by their servants; yet the defendants conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed. —Plea, that the collision took place solely through the carelessness, negligence, &c. of the servants of the defendants; and that the engines and carriages were under the guidance of the servants of the defendants, who were fit and competent persons to have the guidance of the same; and that the negligence was unauthorised by the defendants, and without their leave, license, or knowledge:—*Held*, first, that no ground of action appeared on the face of the declaration; secondly, that the plea did not amount to the general issue. *Hutchinson* (*Administratrix*) v. *The York, Newcastle, and Berwick Railway Company*, 580

Wigmore (*Administratrix*) v. *Jay*, 589

NOTICE TO TAKE LANDS.

1. A Railway Company served a notice on the owner of houses and property, situate on a hill, that they required so much of the land as would be necessary to construct a tunnel,

but having, in the course of their works, endangered the foundation of the plaintiff's houses, he filed his bill and obtained an injunction. The Company put in their answer to the bill, and subsequently gave a second notice, and took the necessary steps for entering upon the whole of the plaintiff's property, under the 85th section of the Lands Clauses Consolidation Act.

The Company moved, on affidavits, to dissolve the injunction:—*Held*, by Vice-Chancellor *Wigram* and the Lord Chancellor, that, after answer filed, the proceedings subsequently taken by the Company could not be brought before the Court by affidavit, but must be placed at issue between the parties, by filing a supplemental answer.

That, under the Lands Clauses Consolidation Act, the powers of Railway Companies to take lands within the prescribed limits are not exhausted by one notice, or one taking, if further land is required for the purposes of their Acts. *Stamps* v. *The Birmingham, Wolverhampton, and Stour Valley Railway Company*—Ch. 123

2. A Railway Company gave notice to the lessees of certain property, required by them for the purposes of their railway, of their intention to take and purchase a portion of the premises, and, after the notice, a treaty was commenced, and an agreement entered into on certain terms. Both parties afterwards waived the agreement, and the Company, being desirous of entering into immediate possession, complied with the terms of the 85th section of the Lands Clauses Consolidation Act, and entered. The plaintiffs thereupon filed their bill, praying that the Company might be directed to complete their purchase, and to take all necessary proceedings for that purpose. To this bill the Company demurred, on the ground that the initiative, under the 68th section of the Lands Clauses Consolidation Act, must be taken by the lessees; and also on the ground that the plaintiffs had a remedy by mandamus:—*Held*, by the *Lord Chancellor* (Lord *Cottenham*), overruling the decision of *Wigram*, V. C., that the demurrer be allowed. That, although an old jurisdiction is not taken away by a new remedy, yet, if a new right be given, and a special remedy provided for enforcing it, such remedy must be pursued.

Semble, that the Parliamentary notice alone does not constitute the relation of vendor and purchaser, so that the Court will enforce the performance of all the incidents to that relationship, as in ordinary cases. *Adams* v. *The London and Blackwall Railway Company*—Ch. 271

PLEADING.

See CALLS,
INFANT.
NEGLIGENCE, 2.
PRACTICE.

1. To an action for calls the defendant may, under a traverse of his being a shareholder, prove that he was not such de jure as well as de facto. *Shropshire Union Railways and Canal Company* v. *Anderson*, 56

2. Debt on bond given by the defendant and another to the L. and C. Railway Company, as sureties for the due performance by E. G. of his duties as clerk. The condition of the bond was, that if E. G. should render to the L. and C. Railway Company, or to the committee for managing the London terminus of the L. and C., L. and B., and S. E. Railways a true account of all the receipts and payments of him as such clerk, and also should pay to the L. and C. Railway Company, or to the said com-

mittee, all sums as he should receive on account of the Company or committee, then the obligation to be void. The defendant pleaded, *thirdly*, that the bond was made before the passing of the 9 & 10 Vict. c. cclxxxiii. to consolidate the L. and B., and L. and C. Railway Companies, and that the action was commenced afterwards; and that the L. and C. Railway Company thereby became dissolved. *Fourthly*, that, from the time of the making of the bond up to the time of the passing of the said Act, E. G. rendered to the L. and C. Railway Company an account of all receipts and payments, and paid all sums received by him as such clerk: —*Held*, that the third plea was bad, and was no defence to the action, inasmuch as the new Company was the same as the two old ones, with additional powers, and that the amalgamation of the Companies did not affect the responsibilities of the defendant or E. G.; that the fourth plea was also bad, for not alleging a payment to the committee of the monies received by E. G. on account of the three Companies. *The London, Brighton, and South Coast Railway Company* v. *Goodwin*, 177

3. The plea of never indebted, to an action of debt for calls, puts in issue all the material allegations in the declaration, and, amongst them, the fact of the defendant being a shareholder. *Birkenhead, Lancashire, and Cheshire Junction Railway Company* v. *Brownrigg*, 47

4. Debt for calls.—The declaration stated, that the defendant, on &c., was and from thence hitherto *hath been and still* is the holder of forty shares in the said Company, and then and at the time of the commencement of this suit was *and still* is indebted to the Company, &c., whereby an action hath accrued to the Company by virtue of the Companies Clauses Consolidation Act, and also by virtue of the Midland Great Western Railway of Ireland Act, 1845, to demand &c.:—*Held* good on special demurrer, though not conformable with 8 Vict. c. 16, s. 26. *The Midland Great Western Railway Company of Ireland* v. *Evans*, 205

The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. *Webster*. 207

Wilson v. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 771

PRACTICE.

See NOTICE TO TAKE LANDS.
PURCHASE-MONEY.
RECEIVER.

1. A Railway Company, incorporated by Act of Parliament, is bound to apply all the monies and property for the purposes directed and provided for by the Act of Parliament, and not for any other purpose whatever. If, after the expenses are paid and the public purposes directed and provided for by the Act are fully performed, any surplus remain, such surplus, after setting apart a sufficient sum to answer contingencies, may, if not applied in enlarging, improving, or repairing the works, be divided among the shareholders.

The dividends which are divisible among the shareholders must be considered as their own property, and cannot be applied by the directors to any purposes not included in the Act, without the express sanction of each shareholder.

A Railway Company became, by virtue of certain Acts of Parliament amalgamating them with four other Companies, possessed of a certain number of shares in an unfinished line of railway. The amalgamated Company afterwards purchased, with monies of the Company, more shares in the same

line, and had them transferred into the names of three of their directors. They also negotiated with the directors of the unfinished line for the purchase, out of the funds of the Company, of a portion of that line which had been completed.

A bill was filed by a shareholder, on behalf of himself and all other shareholders, in order to render the defendants, who had purchased the additional shares in the unfinished Company, personally liable for them, and to restrain the completion of the contract for the purchase of a finished portion of the same line.

To this bill the defendants demurred, for want of equity and for multifariousness:—*Held*, by the Court, overruling the demurrer for want of equity, that, although the two transactions were clearly illegal, yet, as they were not alike, either with respect to the persons affected by them, or with respect to the relief which might be given, that the demurrers for multifariousness should be allowed, with liberty to amend. *Salomons* v. *Laing*—Ch. 289

2. The defendant's line, with the exception of six miles, was in Scotland, their principal office was in Scotland, and they had no office out of Scotland, except a joint station with another Company at Carlisle, used only for receiving passengers and goods. By one of their Acts the Companies Clauses Act was incorporated with the Company's Act, so far as was necessary for carrying into effect the English portion of the line:—*Held*, that a service of a writ of summons on the Company's secretary, while attending a meeting in London, was sufficient. *Wilson* v. *The Caledonian Railway Company*, 772

The right of each shareholder to a declared dividend is a separate interest, and cannot be represented by a plaintiff suing on behalf of himself and all other shareholders. *Carlisle* v. *The South Eastern Railway Company*—Ch. 670

The Court of Chancery will not direct an issue where the question of right can be tried by action. *Ex parte Hale*—Ch. 145

PROVISIONAL COMMITTEE.

See WINDING-UP ACT.

1. In an action against a provisional committeeman of a Railway Company, for work, &c., it appeared that the defendant had authorised the pledging of his credit for a portion of the work, but not for the residue, and had subsequently admitted his liability *for the whole*. The Judge directed the jury to consider the circumstances under which the admission was made, and the mistaken view under which the defendant might at that time have acted in respect of the supposed liability of all members of provisional committees:—*Held*, that the direction was right. *Newton* v. *Belcher*, 38

2. In an action by a surveyor against one of the managing committee of a Railway Company, for surveying the line, it appeared that the plaintiff was employed by one of the committee, and which appointment was ratified by a resolution of the committee, at which the defendant presided,—the learned Judge directed the jury to consider whether the defendant could have meant to pledge his own personal credit, or merely the credit of the funds of the Company:—*Held*, that the direction was right.

If the contract was, that the defendant should pay if he had funds of the Company, and he had received them, then the conditional contract would have become absolute, and the defendant would have become liable in indebitatus assumpsit. *Higgins* v. *Hopkins*, 75

3. An allottee of shares in a projected Railway Company paid his depo-

sit into the bank named in the prospectus, in which the defendant's name appeared as one of the provisional committee and as chairman of the committee of management.

The defendant had not taken any part in the management of the concern, but on one occasion had acted as chairman of a meeting, when he had dissented from the proceedings. In an action against the defendant for a return of the deposit, the scheme having been abandoned:—*Held*, that the defendant was not liable.

Letters written by the secretary of a Company, in answer to letters addressed to him in his character of secretary, are not evidence against the directors of the Company — *semble*, though the prospectus refer to him for further information. *Burnside* v. *Dayrell*, 67

See The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. *Webster*, 498

POOR RATES.

See RATING.

PURCHASE-MONEY.

1. Where a Railway Company had paid the estimated value of a piece of land into Court, under the 85th section of the Lands Clauses Consolidation Act, and afterwards concluded the purchase by contract, the Court will not order the payment out to the Company of the sum deposited, unless the vendor join in the petition, or a copy of it be served upon him. *Ex parte The South Wales Railway Company*—Ch. 151

2. On a petition for the confirmation of the Master's report, approving of a proposed purchase wherein to reinvest a sum in Court, the produce of land sold by a tenant for life to a Railway Company, under the provisions of the Lands Clauses Consolidation Act, it is not necessary that the persons entitled in remainder should be before the Court.

Reinvestment in the purchase of copyholds of inheritance, under special circumstances, allowed. *Re The Estate of W. F. Browne, and of The Oxford and Bletchley Junction and Buckinghamshire Railway Acts*—Ch. 733

3. In cases where the land belonging to a corporation is taken by a Railway Company, and the purchase-money is paid into the Bank, the Court will not allow any steps to be taken with reference to the final application of such purchase-money, unless it be satisfied that the freemen are represented. *Re The Great Northern Railway Company's Act, No.* 1, 1851, *Ex parte The Mayor, Aldermen, and Citizens of the City of Lincoln*—Ch. 738

RAILWAYS CLAUSES CONSOLIDATION ACT.

See CARRIER.
STATUTES.

A Railway Company, empowered by Act of Parliament to construct "a Railway and works," within certain limits as to space and time, is authorised, under the 16th section of the Railways Clauses Consolidation Act, within such limits, without the consent of the owner, to take land for the purpose of constructing the various works mentioned in that section, although the line be opened, and the works be not necessary, but only convenient for the purposes of the line. *Sadd* v. *The Maldon, Witham, and Braintree Railway Company*, 779

RATING OF RAILWAYS.

By a local Act for regulating the poor of Southampton, it was enacted, that every person "who shall let out his house in separate apartments or

ready furnished to lodgers, or shall so let tenements built on ground appurtenant to his principal dwelling, shall, for the purposes of this Act, be deemed to be the occupier thereof." The Company were the owners, but not the occupiers, of the custom-house, a manufactory, and workshops:—*Held*, that this enactment did not apply to such premises, though they were within the general outer inclosure of the Company's premises.

It was provided, by sect. 188 of the Company's Act, that they might build or provide, out of their income, steam-tugs, for the purpose of towing any vessels into or out of the Docks, from or to Southampton, or any part of the British Channel. They employed for that purpose a steam-tug, "which offered considerable advantage to those who used the docks, and might be fairly considered as an useful appendage to the docks, and conducive to the general profits of the concern, although it was not indispensably necessary, as the duty might have been done by hiring other steam-boats on each occasion, but at less advantage and convenience both to the Company and the public using the docks:" —*Held*, that the steam-tug must be taken as ancillary to the docks, and part of the floating capital used in carrying on the concern; and that, in estimating the amount of the assessment of the Company to the poor-rate, the expense of it was properly deducted.

A sum of 1000*l.* had been allowed to the directors as a reasonable remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the Company in managing the affairs of the docks, independently of the profit on the capital employed: —*Held*, that, regard being had to the nature of the concern, this allowance might be deducted, though the directors had declined to receive any remuneration for the last year before the assessment.

Cranes, steam-engines, and other like ponderous machinery, though attached to the freehold, were capable of being detached with as little injury to it as other fixtures put up for the purposes of trade, and usually valued as between incoming and outgoing tenants:—*Held*, that these ought not to be treated as stock-in-trade, and that no deduction ought to be made in respect of them.

Income-tax is not a tax upon the subject-matter rated, which a tenant, as such, would be obliged to pay; and, therefore, no deduction ought to be made in respect of it. *Reg.* v. *The Southampton Dock Company*, 428

2. The mileage principle is not the correct mode of rating a railway to the relief of the poor; but the value which the land occupied in each parish produces, after the due allowances, is that upon which the railway is to be rated in such parish.

Any expenses, wherever arising, which the Company can shew to be necessary for keeping the hereditaments, which are the subject of the assessment, at their value, and for the just protection of the Company in each parish, may properly be taken into consideration.

A Railway Company is entitled to a deduction from the rateable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of such assessment. Such deduction is not included in working expenses. And, the fact that the Company has not incurred the expense, or laid by from their receipts any sum to meet it, will not disentitle them to make such deduction; in this respect, there is no substantial distinction between

a railway and house property, or any other of a perishable nature, which must require renewal.

By agreement between the London and Brighton R. C. and the South Eastern R. C., the traffic of the latter was to pass free over a certain portion of the line of the former, in consideration of the traffic of the former passing free over a certain portion of the line of the latter. A certain distance of the line of the appellant Company within the respondent parish was affected by this arrangement. No part of the South Eastern R. C. was within that parish:—*Held*, that this was the same in substance as if so many tickets were daily issued, without money paid for them by the South Eastern R. C. in return for so many received, the tickets mutually transferred representing so much money earned; these earnings being subject to the same deductions as if they were received in money; and that, in estimating the rateable value of the London and Brighton R. C. they were entitled to deduct the value of the tolls payable by them in respect of the passage of their traffic over an equal portion of the South Eastern line.

Overseers, in making a prospective rate, are to make it upon the supposed prospective value, ascertained as well as it can be from the latest evidence in their power as to the antecedent value. It cannot be required that the assumed and actual value should correspond in minuteness; and parish officers are justified in making the rate on the latest published account, if that was the latest information they had, or could be reasonably expected to procure; but if, before the rate is made, the Company communicate to them new facts affecting the rateable value, that ought to be taken into account.

A rate was made on the 20th of November, 1847, based on the half-yearly statement published by the Company upon the 10th of August, but made up to the 30th of June. In the interval between the 30th of June and the 20th of November the value of the machinery and plant of the Company had been materially increased from 26,000*l.* to 33,000*l.*:—*Held*, that on this outgoing the Company were entitled to a deduction.—*Reg.* v. *The London, Brighton, and South Coast Railway Co.*, 440

Reg. v. *South Eastern Railway Co.*, 459

Reg. v. *Midland Railway Co.*, 464

RECEIVER.

See INCUMBRANCERS.

A bondholder or mortgagee of a Railway Company has, under the provisions of the Companies Clauses Consolidation Act, a power to have a receiver appointed by justices to receive the tolls and sums liable to the payment of his principal and interest, but has not any specific lien on the property or effects of the Company. He is not, however, prevented from pursuing all such legal and equitable remedies against the Company as he may have in common with other creditors in addition to his own particular remedies. The receiver contemplated by the Companies Clauses Consolidation Act is one appointed by two justices under that Act, and not a receiver appointed by the Court of Chancery.

A suit was instituted by certain bond creditors of a Company to obtain payment of their demands, and for other pursoses, and for the appointment of a receiver of the tolls, estate, and effects of the Company. An order for a receiver having been made by the Court of Chancery, with the consent of all parties to the suit, and while he was in possession, an

execution creditor procured a writ of *fi. fa.* to issue. On petition presented by a simple contract creditor, alleging that the order appointing the receiver had been obtained improperly, and by surprise on the Court, and it appearing to the Court, that, if all the circumstances had been before it, such an order would not have been made, leave was given to him to levy, notwithstanding the possession of the receiver, unless the amount of his debt was paid into Court within a time specified in the order.

Where the facts are sufficiently before the Court, it will dispense with the usual reference to the Master to examine the petitioners *pro interesse suo*. *Russell* v. *The East Anglian Railway Company*—Ch. 532

SEAL OF COMPANY.

See COMPENSATION, 1.
CONTRACT UNDER SEAL.

SHARES.

See INFANT.

1. An allottee of shares, who has paid his money for the shares in a concern which never comes into existence, or which is abandoned, may recover it back as money had and received to his use, unless he can be shewn to have consented to or acquiesced in the application of the money.

The plaintiff applied for and had allotted to him shares in a projected Railway Company, and by his letter of application agreed to accept the same, subject to the provisions of the subscribers' agreement, and to execute the same and any other agreements or deeds. The letter of allotment stated, that scrip for the shares would be delivered to the plaintiff upon his "executing the parliamentary contract and subscribers' agreement." The subscribers' agreement gave the directors a much larger power than the 7 & 8 Vict. c. 110, s. 23, authorised them to assume, and also enabled them to expend the deposits in the exercise of such excessive power:—*Held*, that this was not such a deed as the plaintiff could be called upon to execute; that he was not bound by the application of the deposits according to that deed, and, the project having been abandoned, he was entitled to recover back his deposit. That, if the directors had prepared such a deed as they might properly have called on the defendant to execute, and had given him an opportunity of executing it, he would have been bound by its terms, although he had not executed it.

On the winding up of the Company, a committee of inquiry was appointed, and the defendant had handed to him the minute-book, containing certain resolutions entered by the secretary:—*Held*, that the defendant was sufficiently a party to such resolutions as to make them evidence against them. *Ashpitel* v. *Sercombe*, 224

2. The special Act of a Railway Company provided, that, for the purpose of voting, each sum of 25*l.* of the capital of the Company should be considered as representing one share, and that no one should be entitled to vote in respect of any less proportion of the capital; and that three months should elapse between the making of successive calls.

The capital of the Company was in the first instance divided in shares of 25*l.* each, but these were afterwards reduced to 20*l.* each. On the 11th of January *the directors* resolved, that a call be made payable on the 15th of February; and on the 8th of May they resolved that another call be made payable on the 19th of June:—*Held*, *first*, that the shares were valid, though less than 25*l.* each; *secondly*, that the directors were em-

powered to make the calls; *thirdly*, that a proper interval had elapsed between the making of the two calls.

Per *Parke*, B.—A call may mean either the resolution, or its notification, or the time when it is payable. —*The Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company* v. *Mitchell*, 235

3. The plaintiff applied to the committee of management of a Railway Company for shares, and undertook to accept the same or any number that might be allotted to him, and to pay the deposit of 2*l.* 2*s.* per share, and to execute the subscribers' agreement, as might be required. The letter of allotment, allotting to him 100 shares, was headed "Not transferable;" and indorsed on it was a memorandum that the committee of management, being of opinion that it would be an accommodation to the subscribers if they were allowed the option of either paying the whole or a portion of their respective deposits at present, and the remainder at a future day, and considering it unnecessary to lock up the large sum of money over and above what any expenses could require, informed him that the bankers were authorised to receive, in part of his deposit, 10*s.* per share before the 17th of November. This the plaintiff duly paid. In an action by the plaintiff to recover back this deposit, the scheme having been abandoned:—*Held*, first, that the contract to subscribe arose from the offer contained in the letter of allotment, and the acceptance of it by the plaintiff's complying with its terms and paying the deposit; and the entire contract, not being in writing, could not be stamped. Secondly, that the deposit was paid for defraying the preliminary expenses, and, being so applied, the plaintiff could not recover any part of it back.

Semble, that the 7 & 8 Vict. c. 110, s. 23, does not forbid the receipt of more than a certain amount for preliminary expenses. *Willey* v. *Parratt*, 32

4. A shareholder having become bankrupt, afterwards, and before he obtained his certificate, calls were made. The assignees possessed themselves of the scrip, and a correspondence took place beeween the official assignee and the trade assignee, in the course of which the latter sent the former a statement of the bankrupt's property, comprising in it the value of the shares, and resulting in an estimate of the probable amount forthcoming to work the fiat and pay dividends. The trade assignee subsequently wrote to the official assignee, suggesting the propriety of selling the shares which continued in the possession of the assignees:—*Held*, first, that there was no sufficient evidence to warrant a jury in concluding that the assignees had accepted the shares. Secondly, that, the property in the shares continuing in the bankrupt, the claim of the Company for the calls subsequent to his bankruptcy was not barred by his certificate, not being proveable as a debt due in futuro under the 51st section, or as a debt due on a contingency, within the meaning of the 56th section of the 6 Geo. 4, c. 16. *The South Staffordshire Railway Company* v. *Burnside*, 611

SHERIFF.

See COMPENSATION, 4.
INCUMBRANCERS.
RECEIVER.

SPECIFIC PERFORMANCE.

See ACT OF PARLIAMENT.

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STATUTES.

7 & 8 Vict. c. 110, s. 23,	32, 224
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———————, s. 26,	205, 214
———————, s. 29,	5
———————, s. 97,	790
8 & 9 Vict. c. 18, s. 18,	600
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———————, s. 123,	628
———————, s. 145,	197
8 & 9 Vict. c. 20, s. 16,	779
———————, s. 69,	97
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STATUTES (CONSTRUCTION OF).

See CALLS, 2.

CONSTRUCTION OF ACT OF PARLIAMENT.

MORTGAGE.

RATING OF RAILWAYS.

TOLLS.

By 9 & 10 Vict. c. ccxxxiv. it is provided, "that, in every case in which the railway shall cross the road otherwise than at right angles, the bridges shall be made with skew arches, so as not in any manner to alter the direction of or interfere with the line of the said roads or the foot-paths to the same."

By 8 & 9 Vict. c. 20, s. 49, it is provided, that, of every bridge to be built for the purpose of carrying a railway over a turnpike road, the width of the arch shall be such as to leave thereunder a clear space of thirty-five feet; provided (sect. 51) that, where the average available width for the passage of carriages is less than that width, the width of the bridges need not be greater than such average available width, but so as not to be less than twenty feet. Provided, that, if the average available width of the road be afterwards increased, the Railway Company shall increase the width of the bridge, if required, to an extent not exceeding the width of the road so widened, or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway.

On an indictment for a nuisance to a highway for carriages, by building on it the piers of a railway bridge, and narrowing it, it appeared, that the piers of the bridge stood on the foot-path on each side; that they were built parallel to the line of carriage road, not directly opposite each other, as the bridge was a skew arch; and that the carriage road remained as it was before, twenty-eight feet wide; but that the foot-paths were each narrowed:—*Held*, first, that the object of the above section of the private Act was to prevent the Railway Company from turning or bending the road so as to carry it at right angles under any bridge over which the railway passed, and again turning it back on the other side of the bridge to its former direction and line; but that the section did not affect any question as to the width of the bridge or the narrowing of the road. Secondly, that the meaning of the General Act was, that where the average available width for the *passage of carriages* on any road exceeded thirty-five feet, it might be narrowed to thirty-five feet under the arch; where it was less, the arch might be of the same width as the road, so as it was not less than twenty feet; and if the road was afterwards widened, the arch must be proportionably widened up to but not beyond thirty-five feet. Thirdly, that the foot-paths were not to be taken as part of the turnpike road over which the arch of the bridge was to be thrown, within the meaning of the above Acts of Parliament.

And, lastly, that the obstruction to foot-passengers only was not forbidden by the above Acts of Parliament. *The Queen* v. *Rigby*, 479

SUBSCRIBERS' AGREEMENT.
See SHARES.

SUMMONS, SERVICE OF.
See PRACTICE, 2.

SURETY.
See PLEADING, 2.

TENDER (ACCEPTANCE OF).
See COMPENSATION, 1.

TITHE.
See ASSESSMENT.

TOLLS.

1. It was agreed between the Manchester, Bolton, and Bury Railway Company, and The Bury and Rossendale Railway Company, "first, that they would mutually concur, at the expense of the latter Company, in obtaining an Act of Parliament for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall; secondly, that the Bury and Rossendale Railway Company should have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it should be referred in the usual way, should determine; thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines or any portions thereof,) between Salford and Rawtenstall, or any points intermediate to these, should be carried on, as respects engine power and carriages, clerks and porters, and all other expenses (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who should pay to the Manchester and Bolton Railway Company, for the use of their railway, and in respect to the traffic therein specified, a pro ratâ proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic: with a proviso, that nothing therein contained nor elsewhere provided, should authorise the Manchester and Bolton Railway Company to receive, for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway at Salford; nevertheless, the Manchester and Bolton Railway Company should be entitled to charge, for the use of such portion of their railway, for a length of two miles at the least. After the making of this agreement, the Manchester, Bolton, and Bury Railway Company was incorporated with the Manchester and Leeds Railway Company, and afterwards became "The Lancashire and Yorkshire Railway Company;" and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company," and ultimately "The East Lancashire Railway Company;" and by subsequent Acts of Parliament, certain other railways became incorporated with it. A special verdict having found that the length of the Manchester, Bol-

ton, and Bury Railway, from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway at Clifton, was four miles and no more:—*Held*, on the construction of the above agreement, first, that the plaintiffs were not entitled to charge the defendants that proportion for the whole amount received as tolls, which the whole distance of two miles to be charged on this part bore to the whole distance travelled on the line of the defendants alone; but that the rate per mile for the charge was first to be settled by the relative distances actually travelled on each; and, when so settled, a distance of two miles was to be paid for at that rate; and, secondly, that the agreement was limited to the traffic along the Bury and Rossendale Railway, and was not extended by the subsequent Acts of Parliament. *The Lancashire and Yorkshire Railway Company* v. *The East Lancashire Railway Company*, 802

2. The Great Western Railway Company, by the 5 & 6 Will. 4, c. cvii. were authorised to take certain toll for the conveyance of passengers, &c. By the 9 & 10 Vict. c. cccxxxvii. and the 9 & 10 Vict. c. cccxxxviii. (which Acts received the Royal Assent on the 3rd August, 1846), the Birmingham and Oxford Junction Railway Company were incorporated, and authorised to receive toll at a rate less than on the Great Western Railway. By these Acts the Great Western Railway Company was empowered to purchase the Birmingham and Oxford Junction Line, provided that no such purchase should take effect until the tolls of the Great Western Railway should have been reduced by Act of Parliament to the same scale as that of the Birmingham and Oxford Junction Railway. By the 9 & 10 Vict. c. cccxv. (which received he Royal Assent on the 3rd of August, 1846), the Birmingham, Wolverhampton and Dudley Railway Company were incorporated, and authorised to receive the same tolls as the Birmingham and Oxford Junction Railway Company. By an agreement, dated the 12th November, 1846, the directors of the Birmingham and Oxford Junction Railway Company and the directors of the Birmingham, Wolverhampton and Dudley Railway Company agreed to sell to the Great Western Railway Company, and that Company agreed to purchase, both their lines. The 10 & 11 Vict. c. cxlix. empowered the Great Western Company to purchase the Birmingham, Wolverhampton and Dudley Railway; and it was by that Act provided, that the Great Western Railway Company might demand for their own use, or of the Birmingham, Wolverhampton, and Dudley Railway Company, a scale of toll much less than that fixed by the 5 & 6 Will. 4, c. cvii., but not precisely the same as that authorised by the 9 & 10 Vict. c. cccxxxvii. and 9 & 10 Vict. c. cccxxxviii. The 10 & 11 Vict. c. cxxvii. (which received the Royal Assent on the 2nd July, 1846,) authorised the Birmingham, Wolverhampton, and Dudley Railway Company to sell their railway to the Great Western Railway Company; and it was thereby enacted, that the reduced scale of tolls therein contained, and which is the same as that contained in the 10 & 11 Vict. c. cxlix. should be deemed and taken to be the reduced scale referred to in the 9 & 10 Vict. c. cccxxxvii.:—*Held*, that, until the purchase of one or both of the lines was finally effected, the Great Western Railway Company were entitled to take the toll authorised by the 5 & 6 Will. 4, c. cvii.; but that, after the completion of either of the purchases, the scale of tolls to be taken by the Great

Western Company, as well on their original line as on the purchased line or lines, must be reduced to the scale fixed by the 10 & 11 Vict. c. ccxxvi. and 10 & 11 Vict. c. cxlix. *The Attorney-General* v. *The Great Western Railway Company*, 403

TRESPASS.

See ARREST.
MASTER AND SERVANT.

VENDOR AND PURCHASER.

See NOTICE TO TAKE LAND.

WINDING-UP ACT.

See CONTRIBUTORY.
JOINT STOCK COMPANY.
PROVISIONAL COMMITTEE.

1. Where the affairs of a Railway Company have been referred to the Master under the Winding-up Acts, the Court will stay proceedings against one of the provisional committee for a debt due by the Company until the plaintiff shall have proved his claim before the Master, though the application be not made until after execution. *MacGregor* v. *Keiley*, 208

2. Judgment as in case of a nonsuit will not be given against a member of a provisional committee of a public Company, where proceedings are pending under the 11 & 12 Vict. c. 45, for winding up the affairs of the Company, unless the plaintiff has been guilty of neglect in going before the Master to prove his claim. *Birch* v. *Lowndes*, 215

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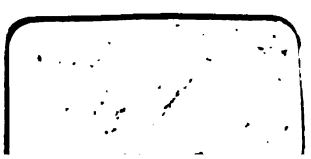
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